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CURRENT EVENTS.

INTOXICATING LIQUORS—INTERSTATE COMMERCE.—The law relating to intoxicating liquors has of late years assumed extraordinary proportions. Within living memory the only appearance of the subject on the statute books of the States was the imposition of very moderate license fees for the privilege of retailing those liquors, and the matter very rarely appeared in the courts; now in all the States there are numerous statutes regulating, and in some States prohibiting, the traffic in ardent spirits, and subjecting dealers in them to heavy penalties. Sales to minors and to habitual drunkards are forbidden; many restrictions upon free trade in liquors have been enacted, and many decisions have been rendered construing the statutes on the subject. Many nice distinctions have been made, until now the law relating to intoxicating liquors has become one of the great subdivisions of the law of the country. We do not propose to discuss this important subject in regard to the questions of morality involved in it, nor the rights of individuals as subordinated to the general welfare of the community. But we will consider intoxicating liquors only in the light of commercial material, respecting sale, purchase, transportation and exchange, and not with reference to the consumption of such liquors or its consequences. There has recently arisen a question bearing on this subject and respecting the police powers of the States, and their possible conflict with the constitutional powers of congress to regulate commerce between the several States. The precise question to which our attention has been attracted is whether, conceding the police power of a State to prohibit the manufacture of intoxicating liquors for consumption within the State, that power includes the probibition of the manufacture of such liquors for exportation to other States, and which it has been contended formed the material subject-matter of interstate commerce, and was for that reason beyond the jurisdiction of the State and subject only to that of congress. The Supreme Court of Iowa, in which the question arose, decided that the State could, under its general jurisdiction and its police power, prohibit the manufacture of intoxicating liquors absolutely, and that it was wholly immaterial for what purpose such liquor was manufactured. On the other hand, it is contended that the police power of the State only extends to such sumptuary measures as may be deemed necessary to protect the morals of its own citizens, that the manufacture of intoxicating liquors intended *bona fide* for exportation from the State, and actually so exported, is not at all within the reason of the rule of law which, under the name of public policy and police powers, authorizes States to enact laws controlling the business of individuals in order to protect the community against evils, real or imaginary, resulting or expected to result from the business so interdicted, that such laws are necessarily local and cannot consistently with the constitutional rights of citizens of other States be made to affect their interests. This is "a very pretty quarrel as it stands." and involves on the one hand the powers of congress under the constitution of the United States to regulate commerce between the several States, and on the other hand the reserved rights of the States themselves. The question has gone, or will go to the Supreme Court of the United States, which in due time will pronounce definitely on the subject. Meantime, we do not hesitate to express our opinion, that the State of Iowa, in assuming the authority to prohibit the manufacture of intoxicating liquors within the State, is fully warranted by the constitution of the United States. The powers of a State are general, plenary and absolute, limited only by the powers which, by the constitution, are conferred upon congress. That body has undoubtedly the power and right to regulate commerce between the States, but does that power include any jurisdiction over the subject-matter of that commerce? Can congress limit or control the production of any article, the subject-matter of that commerce, and has it any jurisdiction of the raw material out of which that article is manufactured? Can any jurisdiction over a field of corn be claimed upon the ground that, when converted into

meal, it will probably or even certainly be distilled, and the whisky it produces become the subject-matter of interstate commerce? Commerce is the lawful interchange of lawful commodities between different States or countries. Interstate commerce is that interchange between the several States of this Union. Of course it needs no demonstration that congress can and will regulate no commerce that is not lawful, and this brings us to the principal question in the case. Can congress, under this power, regulate commerce in an article which is produced within the jurisdiction of a State in express violation of its laws? Does not the general powers of a State under its reserved rights authorize it to prohibit the production or manufacture of any article which, in the opinion of its legislature, will probably prove deleterious to its citizens? We think that unless there is a provision in the constitution of the State limiting the powers of the legislature in this respect, that body could forbid the production within its borders of any commodity whatever which it might consider deleterious. The powers of a legislature over the citizens of the State and their property is absolute, except so far as it is limited by the constitution of the State or that of the United States. Citizens of other States have no rights within a particular State which are not enjoyed by the citizens of that State. Hence, it follows that a citizen of another State could not produce whisky in Iowa for exportation unless a citizen of Iowa could lawfully do so, and the State could forbid the production of whisky for exportation, if for no other reason but because its production for that purpose would facilitate the evasion of the law prohibiting the manufacture of such liquors for consumption within the State. In short, the interstate commerce which congress is empowered to regulate is commerce in *lawful* commodities, and cannot protect an article, the production of which was illegal at the place where it was offered for shipment, and which was there liable to be seized and destroyed. For these reasons we are satisfied that an article, the production of which is unlawful in the State in which it is produced, cannot be protected by the interstate commerce clause of the constitution, even if it is offered to and accepted by a carrier within that State for transportation to another State.

NOTES OF RECENT DECISION.

CONSTITUTIONAL LAW — SUITS AGAINST STATES—FEDERAL COURTS — JURISDICTION.— We do not usually comment in this department on the rulings of any other courts than those of the last resort, either of the nation or of some one of the States. We now make an exception in favor of a case decided by United States circuit court for the southern district of Iowa.[1] The facts of the case were that the plaintiff, a railroad company of Illinois, filed a bill to enjoin the defendants, who are railroad commissioners for the State of Iowa, from enforcing a schedule of rates of freight carried by railroads in that State. The answer of the defendants was, in effect, a plea to the jurisdiction, alleging that they had no sort of personal interest in the matter and only acted officially; that the State of Iowa was the only party in interest; that the action was really a suit against the State, and that the court could have no jurisdiction of it. Judge Brewer, after commenting upon the importance of the question with reference to the magnitude of the interest involved, states the construction that has heretofore been placed upon the eleventh amendment of the constitution of the United States. The first ruling upon the subject was that of Chief Justice Marshall, who, in a well known leading case,[2] lays down the rule defining jurisdiction as follows: "It may, we think, be laid down as the rule, which admits of no exception, that in all cases where jurisdiction depends upon party, it is the party named in the record; consequently the eleventh amendment, which restrains the jurisdiction granted by the constitution over suits against States, is of necessity limited to those suits in which the State is the party on the record." Subsequent decisions of the Supreme Court of the United States have followed this ruling.[3] The court, however, adds that this rule has been abrogated by more recent decisions of the supreme court, which established the principal that the eleventh amendment forbids federal courts to assume jurisdiction of suits not only against a State itself, but of those against its officers acting officially in the in-

[1] Chicago, etc. Co. v. Dey, Circuit Court, S. D. Iowa, July 27, 1888; 35 Fed. Rep. 866.
[2] Osborn v. Bank, 9 Wheat. 738.
[3] Davis v. Gray, 16 Wall. 203.

terest of the State.[4] But that it will be observed in all the cases in which it has been so decided, the interest of the State was founded upon a contract or a duty, and the object of the suit was actually to compel the State to fulfill its contract or perform its duty, and this it is held is, under the eleventh amendment, utterly beyond the power of any court whatever. The court, it will be observed, divides these actions against a State into two classes. In one the State has contracted with its citizens or other persons, or has assumed the performance of a duty or the payment of money, its interest is direct and the object of the action is to compel it to perform the duty or pay the money as the case may be. Of this line of litigation the court decides that no federal court whatever can have jurisdiction.

There is another class of actions against the officers of a State which affect not the contractual but the governmental powers of the State government, and of these the court holds that federal courts have full jurisdiction. These are cases in which the parties interested and liable to be affected by the decision are private persons or corporations, and the State has no other interest in the suit or the law upon which it is founded, than it has in the general protection of the rights of its citizens or the enforcements of its laws. The case under consideration the court holds to be one of this character, that the parties interested in the decision are on the one hand railroad corporations, and on the other the shippers of merchandise or other goods, and the State has really no interest in the result, although its officers are the parties on the record. The court concludes by assuming jurisdiction of the case for which it finds many authorities.[5] It, however, concedes that the question of jurisdiction is a doubtful one, but "takes the responsibility," citing as the authority not of General Jackson as it might well have done, but that of Chief Justice Marshall, who says:[6] "The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given; the one or the other would be treason to the constitution."

[4] *In re* Ayers, 123 U. S. 443; 8 S. C. Rep. 164. See also Louisiana v. Jumel, 107 U. S. 711; 2 S. C. Rep. 128; Antoni v. Greenhow, 107 U. S. 769; 2 S. C. Rep. 91; Hagood v. Southern, 117 U. S. 52; 6 S. C. Rep. 608.

[5] Railroad Company v. Commissioners, 19 Fed. Rep. 679; Trust Co. v. Stone, 20 Fed. Rep. 270.

[6] Cohens v. Virginia, 6 Wheat. 264.

PERPETUATING TESTIMONY—NOTICE AND PUBLICATION.

I. *Notice*—1. *Necessity of Notice.*—In all cases depositions to perpetuate testimony, both in bills *in perpetuam rei memoriam* and bills to examine witnesses *de bene esse*, whether in statutory proceedings or under the ordinary equity practice, all parties interested must have due or reasonable notice of the time and place of examination,[1] and they will be required to appear and answer,[2] and the suit is proceded with in the usual way by filing a replication, and issuing a commission or subpœna for the examination of the witnesses.[3] If the depositions are taken *ex parte*, without notice, they will be suppressed.[4] The New York statute authorizing and regulating the

[1] Dearborn v. Dearborn, 10 N. H. 473; Welles v. Fish, 3 Pick. 74; Faunce v. Gray, 21 Pick. 243; Underwood v. Lacapere, 10 La. Ann. 766; Moses v. Gunn, Root (Conn.), 307; Whiting v. Jewel, Kirby (Conn.), 1; Brooks v. Schultz, 5 Robt. (N. Y.) 656; s. c., 3 Abb. Pr. (N. S.) 124; Walt v. Whiting, 7 Cow. (N. Y.) 69; Middleton v. Taylor, 1 N. J. L. 445; Arnold v. Renshaw, 11 N. J. L. 317; Dambmann v. White, 48 Cal. 439.

[2] Ellice v. Roupell, 2 New Rep. 3, 150; s. c., 32 Beav. 279, 308; Taylor's Ev., § 490.

[3] 1 Smith Ch. Pr. 135; Welf. Eq. Pl. 147; 2 Barb. Ch. Pr. (2d Ed.) 143.

[4] Lovenden v. Milford, 4 Bro. C. C. 540.

examination of witnesses *de bene esse*[5] has been construed as requiring such notice to be given as will enable the party to be present at the examination either in person or by attorney.[6] Under the California statute, upon an application for a commission to take the deposition of a foreign witness, the only notice required to be served upon the opposite party is the order of the court requiring such party to show cause on the day named in the commission.[7] It has been said that in taking depositions *in perpetuam* under the federal judiciary act[8] notice is to be given by the magistrate and not by the party.[9]

In Faunce v. Gray,[10] prior to the commencement of an action against an administrator, his deposition was taken *in perpetuam*, at the instance of the plaintiff, in relation to facts which came to his knowledge before he was appointed administrator; but notice was not given to him as a party interested, and the court held that the deposition was not admissable in evidence, *as a deposition*, in an action by the heir against such administrator, because of want of notice to him as an interested party.

2. *Service of Notice.*—The rule as to the service of notice is not uniform throughout the States. In some cases it is held that the notice must be personally served,[11] while in others it is said that it is not necessary.[12] And it has been held that service by leaving a copy of the notice at the party's place of abode is not sufficient,[13] where the party swears that he did not receive it.[14] On the other hand, it is said that service by leaving a copy of the notice at the place of residence is sufficient.[15] But it seems that proof of service by leaving a copy at the party's house, without stating that it was left with any person, is not sufficient evidence of service.[16] Service by reading the notice is held to be sufficient where no copy is demanded.[17] Even a verbal notice has been held to be sufficient where the fact of notice is not denied.[18]

Service of notice cannot be shown by parol evidence;[19] and the affidavit of the party is not admissible to prove service of notice.[20]

a. On Partner.—Service of notice upon one partner, in an action against copartners, is a sufficient evidence.[21]

b. On Attorney.—The rule as to the service of notice upon the attorney of record of the party is not harmonious throughout the States. In some cases it is held that notice personally served upon such attorney is sufficient, even though the attorney may have appeared without authority,[22] or has withdrawn from the case, of which fact notice was given before making the service;[23] and it has been thus held, even where the statute required the notice to be given to the party personally.[24] Other cases hold that notice served upon the attorney of the party is irregular and not sufficient service,[25] where the party resides in the State,[26] though sufficient where he is a non-resident.[27] It has been said that where the notice is directed to the party it may properly be served upon his attorney.[28]

3. *Must be Reasonable.*—The notice should be reasonable. What is reasonable notice will depend upon the circumstances of each particular case.[29] One day's notice to take depositions in a particular place to a person residing two miles away is said to be reasonable.[30] And a notice to examine a witness in the place where the notice was served, at eight o'clock in the evening of the same

[5] 2 Rev. Stat. 392, and the subsequent amendment thereto; 2 Rev. Stat. 398, § 8.
[6] Elverson v. Vanderpoel, 41 N. Y. Sup. Ct. Rep. 257.
[7] Dambmann v. White, 48 Cal. 439.
[8] U. S. Rev. Stat., § 866.
[9] Young v. Davidson, 5 Cr. C. C. 515.
[10] 21 Pick. 243.
[11] Carrington v. Stimson, 1 Curt. C. C. 437; McEwer v. Morgan, 1 Stew. (Ala.) 190.
[12] Elverson v. Vanderpoel, 41 N. Y. Sup. Ct. Rep. 257. But this case is governed by the New York statute regulating service on notice. See N. Y. Rev. Stat. 392, 398, § 8.
[13] Carrington v. Stimson, 1 Curt. C. C. 437.
[14] Hill v. Norwell, 5 McL. C. C. 583.
[15] Kennedy v. Fairman, 1 Hayw. (N. C.) 404.
[16] Crozier v. Gano, 1 Bibb (Ky.), 257.
[17] Brewington v. Endersly, 4 G. Greene (Iowa), 263.
[18] Milton v. Rowland, 11 Ala. 732.
[19] Barnes v. Ball, 1 Mass. 73.
[20] Lockwood v. Adams, 10 Ohio, 397.
[21] Cox v. Cox, 2 Port. (Ala.) 533.
[22] Smith v. Bodwitch, 7 Pick. 137.
[23] Herrin v. Libby, 36 Me. 350.
[24] Hunt v. Crane, 33 Miss. 669.
[25] Middleton v. Taylor, 1 N. J. L. 445; Arnold v. Renshaw, 13 N. J. L. 317; Buddicum v. Kirk, 3 Cr. C. C. 293; Wheaton v. Love, 1 Cr. C. C. 429; Leiper v. Bickley, 1 Cr. C. C. 29.
[26] Williams v. Gilchrist, 3 Bibb (Ky.), 49.
[27] Pettis v. Smith, 2 A. K. Marsh. (Ky.) 194.
[28] Barrel v. Limington, 4 Cr. C. C. 70.
[29] Atwood v. Frescot, 17 Cal. 37; Ellis v. Jaszusky, 5 Cal. 444.
[30] McGenley v. McLaughlin, 2 B. Mon. (Ky.) 280.

day on which the notice was served, where the witness intended to leave the State the following morning, was held good in Mumford v. Church.[31] Five days' notice to take depositions eighty-three miles away, held *prima facie* reasonable in Dean v. Tygert.[32]

Any notice requiring exertion beyond the usual mode of traveling is not reasonable.[33]

Omission in a commision to take depositions to design what notice shall be given, will not exclude the depositions where it is made to appear that sufficient or reasonable notice was given.[34]

4. *What Should Contain.* — The notice should contain the names of the witnesses whose depositions are to be taken,[35] but need not state their residence.[36] Some of the cases also hold that the notice should state, where the action is pending, when the court in which the case is pending is to be held.[37]

5. *Defect — Waiver.* — An appearance at the examination, either in person or by attorney, without objection, is a waiver of all defects in, and insufficiency of, or want of, notice, as well as all irregularities,[38] but does not waive want of *didimus*.[39]

6. *Sufficiency—Indefiniteness.*—The notice will be sufficient if in substance according to the form prescribed by the statute.[40] Actual notice is said to be sufficient;[41] and it has been held in California that the service of a copy of the order to show cause on a day named in the commission is sufficient notice to take the deposition of foreign witnesses.[42]

Notice to take depositions on a given day, and if not on that day two weeks subsequent thereto, has been held to be a legal notice;[43] and so has a notice to take depositions on the fifth or sixth of a designated month.[44] But a notice to take depositions upon two successive days is said to be irregular.[45] And a notice to take depositions on the fourth, fifth, and sixth of a specified month, or on one or more of them, is indefinite and insufficient.[46] A notice to take depositions on a particular day of the week for three successive months is not good.[47] A notice to take depositions on Sunday is not good;[48] but a notice to take on the fourth of July is good, that day not being a legal holiday.[49]

II. *Publication*—1. *Discretion of Court.*—The publication of depositions taken *in perpetuam* is a matter resting in the sound discretion of the court, controlled by the special circumstances surrounding each particular case;[50] and, as a rule, publication will not be made while the witness is yet living, or capable of attending the trial; and is never made except in support of an action.[51] By the English practice the court will not allow a deposition taken under a bill *in perpetuam* to be published, except in support of a suit or action, and then only after the death of the witness, or in case of his being sick or prevented by accident from attending court to be examined.[52] There are very few cases in which publication has been made during the life-time of the witness,[53] and as to some in which it has been ordered doubts have been expressed.[54] If it is shown to the satisfac-

[31] 1 Johns. Cas. (N. Y.) 147.
[32] 1 A. K. Marsh. (Ky.) 172.
[33] Shropshire v. Dickinson, 2 A. K. Marsh. (Ky.) 20; Waters v. Harrison, 4 Bibb (Ky.), 87; Kincaid v. Kincaid, 1 J. J. Marsh. (Ky.) 100.
[34] Parker v. Haggerty, 1 Ala. 632; Brahan v. Debrell, 1 Stew. (Ala.) 14; Lesne v. Pomphery, 4 Ala. 77.
[35] Robertson v. Campbell, 1 Overt (Tenn.), 172; Minot v. Bridgewater, 15 Mass. 492; Barnes v. Ball, 1 Mass. 73.
[36] Hays v. Barders, 6 Ill. (1 Gilm.) 46.
[37] Eastman v. Coos Bank, 1 N. H. 23; Great Falls Mfg. Co. v. Mathes, 5 N. H. 574.
[38] Martin v. Brown, 8 Blackf. (Ind.) 443; Connersville v. Wodleigh, 6 Blackf. (Ind.) 297; Nevan v. Roup, 8 Iowa, 207; Talbot v. Bradford, 2 Bibb (Ky.), 316; George v. Nichols, 32 Me. 179; Croaker v. Appleton, 25 Me. 131; Ragan v. Cargill, 24 Miss. 540; Goodfellow v. Landis, 36 Mo. 168; Tayon v. Ladew, 33 Mo. 205; Seymour v. Farrell, 51 Mo. 95; Jackson v. Perkins, 2 Wend. 308; Jackson v. Kent, 7 Cow. 59; Rushmore v. Hall, 12 Abb. Pr. 420; Kea v. Robenson, 4 Ired. (N. C.) Eq. 373; Shutter v. Thompson, 15 Wall. 151; Miller v. McDonald, 13 Wis. 673.
[39] Seymour v. Farrell, 51 Mo. 95.
[40] Dorrance v. Hutchinson, 22 Me. 357.
[41] Pickard v. Polhemus, 3 Mich. 185. This case was decided under the statute. See Mich. Rev. Stat., 1838, tit. 2, ch. 4.
[42] Dambmann v. White, 48 Cal. 439.
[43] Moore v. Humpherys, 2 J. J. Marsh. (Ky.) 54.
[44] Kennedy v. Alexander, 1 Hayw. (N. Car.) 25.
[45] Carmall v. Post, 8 Watts (Pa.), 406.
[46] Humphries v. McCraw, 5 Ark. 61; Caldwell v. McVicar, 9 Ark. 418; Reardon v. Farrington, 7 Ark. 364; Harris v. Hill, 7 Ark. 452.
[47] Bedell v. State Bank, 1 Dev. (N. Car.) L. 483.
[48] Sloane v. Williford, 3 Ired. (N. Car.) L. 307.
[49] Rogers v. Brooks, 30 Ark. 612.
[50] Harris v. Cotterell, 3 Meriv. 678, 680.
[51] Wequelin v. Wequelin, 2 Curt. C. C. 263; Morrison v. Arnold, 19 Ves. 670; Atty.-Gen. v. Ray, 2 Hare, 518; 1 Smith Ch. Pr. 768; Taylor Ev., § 490; 1 Whart. Ev., § 184.
[52] Morrison v. Arnold, 19 Ves. 669; Barnsdale v. Lowe, 2 Russ. & Myl. 142; 1 Smith Ch. Pr. 366.
[53] Barnsdale v. Lowe, 2 Russ. & Myl. 142.
[54] *Id.*; Wyatt Pr. Reg. 73.

tion of the court that the witness has died since the taking of his deposition, or is unable from any cause to attend the trial, the deposition will be ordered to be published.[55] But where the witnesses are living at the time of the trial, are within the jurisdiction of the court and capable of attending, they must be examined in open court.[56]

The publication of depositions *in perpetuam* for the purpose of perfecting the title to an estate, will not be allowed, even where the witnesses are dead.[57]

Depositions taken *de bene esse* are never published and used except for the purpose of supplying the want of an examination in chief; and where a witness who has been examined *de bene esse* testifies differently on an examination in chief in open court, the deposition cannot be introduced to show the contradiction.[58]

Where the depositions taken on a bill to perpetuate testimony are required to be used in a trial at law, not under the control of the court, the depositions are published, and an officer of the chancery court attends and produces to the court of law the record of the whole proceedings, that the parties may make such use of them as they can.[59]

To obtain an order for the publication of deposition a notice of motion must be served, supported by an affidavit that they are necessary to be made use of in the complainant's behalf; or that the witnesses are dead, or are so infirm that they cannot attend and give evidence at the trial without great danger to life; or that they are, or will be at the time of the trial, out of the State.[60]

Where the deposition of one witness, or of any number of witnesses less than the whole number, is to be published, the officers of the court will be directed not to publish the depositions of the other witnesses.[61]

2. *Rules of Publication.*—The true rules of publication seems to be about as follows:

a. First Rule.—In the examination of witnesses to a will *per testes*, none but subscribing witnesses being examined, and the question of the sanity or insanity of the testator being merely incidental, the depositions stand upon distinct grounds, and publicatio is made as a matter of course.[62]

b. Second Rule.—In the ordinary examination *in perpetuam* publication is not allowable until after the death of the witnesses, because of the dangers incident thereto, there being no limit respecting the points as to which witnesses are examined.[63]

c. Third Rule.—In examination *de bene esse* the depositions will not be published, except by the consent of the parties, or on a strong case being made to the court justifying such publication.[64]

[55] Webster v. Pawson, 2 Dick. 540; Price v. Bridgeman, 1 Dick. 144; Bradley v. Crackenthop, 1 Dick. 182; Gason v. Wordsworth, 2 Ves. Sr. 336, 337; Dew v. Clarke, 1 Sim. & S. 108; Gilb. For. Roman. 140.

[56] Gilb. For. Roman. 141; 2 Story Eq. Jur. (11th Ed.) § 1516, note 2.

[57] Teal v. Teal, 1 Sim. & S. 385.

[58] Cann v. Cann, 1 P. Wms. 567.

[59] Atty.-Gen. v. Ray, 2 Hare, 518.

[60] 1 Smith Ch. Pr. 336; 2 Barb. Ch. Pr. (2d Ed.) 144.

[61] 1 Smith Ch. Pr. 336; 2 Barb. Ch. Pr. (2d Ed.) 144.

[62] Harris v. Cotterell, 3 Meriv. 678, 680.

[63] Barnsdale v. Lowe, 2 Russ. & Myl. 142.

[64] Harris v. Cotterell, 3 Meriv. 680; Gilb. For. Roman. 140.

MINES AND MINERALS—GRANT OF MINERALS—RIGHT TO TAKE OUT SAME—IMPROVEMENTS NECESSARY—OCCUPATION OF SURFACE—EJECTMENT—EVIDENCE—MINING CUSTOM—SUPPLY STORE—CONTRACT FOR PURCHASE OF LAND—FRAUD, STATUTE OF—ITS APPLICATION.

WILLIAMS V. GIBSON.

Supreme Court of Alabama, May 30, 1888.

1. *Mines and Minerals—Grant of Minerals—Right to Take out the Same.*—The express grant of all the minerals or mineral rights in a tract of land necessarily implies the right to work them by penetrating the surface of the soil for the minerals, and by using such means and instrumentalities for the purpose of mining and removing them as may be reasonable, in the light of modern inventions and of the improvements in the arts and sciences, but without injury to the support of the surface or superincumbent soil in its natural state. This right is not limited by a special grant of certain timber and water privileges, and of the right of way to and from the mines. These specifications strengthen rather than repel the implication of the right to occupy the surface.

2. *Same—Improvements Necessary—Occupation of Surface.*—What improvements are reasonably necessary for the profitable and beneficial development of the mine, and how much of the surface of the land may be reasonably needed for this purpose, is a question of fact to be determined from the evidence by the jury.

3. *Same—Ejectment—Evidence—Mining Custom.*—In ejectment for the possession of a tract of land from which minerals had been granted, evidence cannot be admitted to show how much of the surface was needed

for a purpose not incident to or implied in the grant; nor to show what extent of land others have occupied in the neighborhood in carrying on a mine, unless such practice has ripened into a custom.

4. *Same—Evidence — Supply Store.*—It was not error in allowing evidence to be introduced showing that two stores were located near the mine, for the purpose of testing the necessity of occupying the land for such purpose.

5. *Same—Evidence — Improvements.*—In ejectment for possession of the surface of land used for mining purposes, evidence of the value of the improvements erected by the defendant around the mines was relevant as affecting the rental value.

6. *Contract for Purchase of Land—Fraud, Statute of—Its Application.*—A verbal contract of the purchase of the surface of land having never been reduced to writing, nor accompanied by a part payment of any part of the purchase money, was void under the statute of frauds, and could not confer any rights on the alleged purchaser which would prejudice the rights of either party to the suit of ejectment for the land.

SOMERVILLE, J., delivered the opinion of the court:

The present suit, which is one of ejectment under the statute, involves a controversy between the superjacent and subjacent owners of land upon which there is a coal mine, opened and in process of being worked by the defendant. The plaintiff, Gibson, is the owner of the surface, and the defendant, Williams, of the "coal and other minerals," with certain incidental and other rights, derived through various mesne conveyances from one Green B. Frost, the original owner in fee-simple of the premises. In November, 1881, Frost conveyed to one Peters "all the coal and other minerals in, under, and upon" these lands, which are fully described in the deed; "and also all timber and water upon the same, necessary for the development, working, and mining of said coal and other minerals, and the preparation of the same for market, and the removal of the same; and also the right of way, and the right to build roads of any description over the same, necessary for the convenient transportation of said coal and other minerals from said land, and the conveying and transporting to and from said lands all materials and implements that may be of use in the mining and removal of said coal and other minerals, or in the preparation of the same for market." Subsequently, in August, 1884, Frost conveyed the same lands to one C. L. Frost and J. B. Reeves, reserving by exception from the land sold the mineral rights and other interest previously conveyed to Peters, using the same language of description adopted in the deed to him. The defendant is shown to have acquired by deed, through sundry mesne conveyances, the precise interest which Peters owned. This interest may be briefly described under three general heads: (1) A grant of all the coal and other minerals upon or in the land; (2) so much of the timber and water on the land as may be necessary: (*a*) for the development, working, and mining of the coal and other minerals, and (*b*) for the preparation of the same for the market, and their removal from the soil and premises; (3) the right of way, by roads of any description, to and from the lands, so far as may be necessary for the transportation of all minerals mined, and of materials and implements needed in the business of mining and the preparation of the mineral for market.

The material question is what, if any, surface rights pass to the grantee under the first head, which is a grant of all the coal and other minerals upon and in the land. This is dependent in some measure upon the nature and characteristics of the thing granted. Minerals which are unsevered from the soil, or, as sometimes said, which are "in place," are parts of the freehold, and constitute landed property. They are capable of a possession distinct from that of the surface, and may form a separate corporeal hereditament, which is the subject of a distinct inheritance. The title of the soil, as such, including the surface, may be vested in one person; and that of the mines and minerals on it in another. It is only when the minerals are severed from the soil that they become personal chattels, and it is only where the right to dig or to mine them is not exclusive that it may be classed as an incorporeal right or easement merely in the nature of a license. Bainb. Mines (Amer. Ed.) *3, *261; Massot v. Moses, 3 S. C. 168, 16 Amer. Rep. 697; Caldwell v. Fulton, 31 Pa. St. 475; Melton v. Lambard, 51 Cal. 258; Ryckman v. Gillis, 57 N. Y. 68, 15 Amer. Rep. 464. The express grant of all the minerals or mineral rights in a tract of land is, by necessary implication, the grant also of the right to work them, unless the language of the grant itself repels this construction. This is the result of the familiar maxim that "when anything is granted, all the means of obtaining it, and all the fruits and effects of it, are also granted." 1 Shep. Touch. 89; 11 Coke, 52*a*. This involves the incidental right to penetrate the surface of the soil for the minerals, and to use such means and processes for the purpose of mining and removing them as may be reasonably necessary, in the light of modern inventions, and of the improvement in the arts and sciences, but without injury to the support for the surface or superincumbent soil in its natural state. Marvin v. Mining Co., 55 N. Y. 538, 14 Amer. Rep. 322; Wilms v. Jess, 94 Ill. 464, 34 Amer. Rep. 242; Bainb. Mines, *35, *62, *63. It is said by a standard English author, touching this subject: "The right to work mines is so inseparable from the grant of them that it has been expressly decided, not only that the right to enter and work mines is necessarily incident to the grant of mines, without any express authority for that purpose, but that this power cannot be restrained by a special power given in the affirmative, which would authorize more acts than would be implied by law, but which will in nowise exclude the full operation of the law." *Id.* (Amer. Ed.) 34, 35.

It is contended that this incidental right to work the mines on the land is limited by the special grant of certain timber and water privileges, and of the right of way to and from the mines, and that the mention of these privileges under the maxim, *expressio unius, est exclusio alterius*, would rebut the grant of any right to occupy the surface of the soil for miners' houses, or other like purposes. It is often said that great caution is frequently necessary in the application of this maxim and of its twin legal aphorism of synonymous meaning, *expressum facit cessare tacitum*. Broom, Leg. Max. *506. It is obvious that without the right of surface occupation to some extent the grant in question is rendered nugatory. The principle is well settled that one who has the exclusive right to mine coal upon a tract of land has the right of possession, even as against the owner of the soil, so far as is reasonably necessary to carry on his mining operations. Turner v. Reynolds, 23 Pa. St. 199; Rogers v. Taylor, 38 Eng. Law & Eq. 574; Railroad Co. v. Railroad Co., 75 Ala. 524, 525. To construe away this right would be to construe away the grant itself, which cannot be enjoyed without it. It is our opinion that the enumeration of these special privileges was not intended to exclude another which was absolutely necessary to the very life of the grant itself. The right to use timber would not pass by implication. Bainb. Mines, *64. This was, therefore, the acquisition of a new and valuable right. The right of way and water privileges were also more comprehensive, possibly, than would have been yielded pacifically by mere construction. At any rate, these several grants themselves necessarily imply the right to occupy so much of the surface as might be needed to open and work the mines. There could be no use of timber, or water, or right of way, except in connection with working the mines, and there could be no working of the mines without an occupation of the surface in the vicinity of the shafts, slopes, or other requisite openings. These specification strengthen, rather than repel, the implication in question. Marvin v. Mining Co., 14 Amer. Rep. 329, *supra;* Bainb. Mines, *34, *35. The owner of the minerals and mining rights must use his own so not unreasonably to injure his neighbor, the owner of the surface or soil; and it is, we repeat, now settled by the authorities quite universally that he must conduct his mining operations so as to leave a sufficient support for the surface. Carlin v. Chappell, 101 Pa. St. 348, 47 Amer. Rep. 722, and cases cited; Harris v. Ryding, 5 Mees. & W. 69; Rog. Mines, 455. In other words, the exclusive grantee of minerals in lands is entitled to dig and carry away so much of them as he can excavate from the soil without injure to the surface owned by the grantor; the mining right being servient to the surface to the extent of sufficient supports to sustain it in its natural state. Jones v. Wagner, 5 Amer. Rep. 385. But he is not liable for any incidental damages necessarily occasioned by the ordinary and careful operation of his mines, not injurious to the surface, as, for example, the loss of springs by the owner of the soil (Coleman v. Chadwick, 80 Pa. St. 81, 21 Amer. Rep. 93); or the disturbance of the peace and comfort of the surface owner's dwelling by necessary blasting in the mines. Marvin v. Mining Co., 14 Amer. Rep. 322. These incidental rights of the minor, which are appurtenant to the grant of the mineral rights, are to be gauged by the necessities of the particular case, and therefore vary with changed conditions and circumstances. He may occupy so much of the surface, adopt such machinery and modes of mining, and establish such auxiliary appliances and instrumentalities, as are ordinarily used in such business, and may be reasonably necessary for the profitable and beneficial enjoyment of his property. But he is not limited, as we have already said, to such appliances as were in existence when the grant was made, but may keep pace with the progress of society and of modern invention. Bainb. Mines, 63, 64; Marvin v. Mining Co., *supra*. It has been accordingly held in England that a reservation of mines of coal (which is usually the same, in legal effect, as a grant), with rights of way for transportation, involved the right to construct a modern railway, although this mode of transportation was unknown at the time of the grant. The ground of the decision seems to have been that, without use of the railway for shipment, the mines could not, under the evidence, have been worked beneficially or with reasonable profit.

We do not construe the language of the present grant or reservation, as it appears in the deeds of the plaintiff and those under whom he claims, to confer any right, by implication or otherwise, to use the surface of the land for the purpose of erecting coke ovens, designed for the conversion of coal into coke. His only right is to mine and transport coal in its marketable state. The contract clearly contemplated nothing else. Such is the usual construction placed upon similar grants; the principle being thus stated by Bainb. Mines, 63: "An owner of that kind cannot use the surface or any of the materials of the land for changing the character of the mineral to which he is entitled, as for converting coal into coke, clay into bricks, or for smelting the metalic ores, much less for any further purpose of manufacture."

The evidence shows that the defendant claimed the right to occupy as much as three acres of the surface of plaintiff's land as incident to his grant. Upon this area he had erected five two-story frame minors' houses, four log cabins for the occupancy of employees, an air shaft for conveying smoke from and ventilating the mines, a powder house for keeping powder used for blasting, a blacksmith shop, and a store house for furnishing the miners with supplies. Which of these improvements are reasonably necessary for the profitable and beneficial working of the mines is a question of fact to be determined from the

evidence by the jury; and so, likewise, the inquiry as to how much of the surface of the land may be reasonably needed for this purpose. It may be that other suitable lands, conveniently situated, could be obtained at a reasonable price for the site of the miner's houses, the cabins, and the store; or the contrary may be true. It may be that the mine was so far distant from the market for supplies, and that prices in neighboring stores were so extravagant, as to render necessary the establishment of a supply store, both for the economy of time and money of the employees. It may be that such a store was a mere convenience, and not a necessity, within the meaning of the law, for this necessity cannot be deemed to exist if a similar privilege can be otherwise secured by reasonable trouble and expense. O'Rorke v. Smith, 23 Amer. Rep. 446, note; Tied. Real Prop. §§ 606, 609. These and other like considerations it would be proper for the jury to consider in solving the question of necessity—a word of relative import, which may mean, on the one hand, less than imperative need, and, on the other, more than mere suitable convenience. It is manifest that the rulings of the circuit court were not in harmony with these views, including both the instructions to the jury and the rulings on the evidence. The defendant should have been permitted to show to what extent his occupancy of the surface of the lands around the opening of the mine was reasonably necessary, under the above rules, to the prosecution of the mining business. The evidence as to how much of the surface was or might be needed for the erection of coke ovens was properly excluded. It was not competent to show that particular individuals in the neighborhood carried on a mine without a store house for supplies, although a usage in the matter by other miners similarly situated might be relevant if it had prevailed sufficiently long, and possessed the other requisite characteristics of an established custom. But the business of mining in this particular part of the State is probably of a date too recent at this time to give such a custom the age necessary to its validity. The court did not err in allowing evidence to be introduced showing that two other stores were located near the mine. It was quite as relevant to show that there were two stores near by as that there were two hundred, with the view of testing the urgency of the alleged necessity impelling the defendant to establish one for his own needs. The two cases differ only in degree, not in kind.

The value of the improvements erected by the defendant around the mines was relevant as affecting the rental value of the three acres of land sued for, the defendant being liable for rent by way of use and occupation in the event of plaintiff's recovery.

The verbal contract of purchase, which the witness Smith testifies he made, of a part of the surface in controversy, from Frost & Reeves, who sold to the plaintiff, was never reduced to writing, nor accompanied by a payment of any part of the purchase money. It was, therefore, void under the statute of frauds, and could confer no rights on the alleged purchaser which would prejudice those of either party to the present suit. The judgment is reversed, and the cause remanded.

NOTE.—*General Rule.*—It is the general rule as expressed in the principal case, that when an express grant conveyes all the minerals or mineral rights in a tract of land by necessary implication, the right to work the mine is also granted, unless the language used repels such a construction. All the necessary means of obtaining the minerals follow the grant.[1] Thus the conveyance of a tract of land with "the full right, title and privilege of digging and taking away stone-coal to any extent" the grantee might think proper, from under an adjoining tract owned by the grantor, is a conveyance of the entire ownership of the coal in place beneath the adjoining tract.[2] When a grantor gives a deed in which is reserved "the entire privilege of all ore on said premises," with permission to enter upon said premises to mine, clean and take away the same without let or hinderance from the grantee, it was held that the reservation was an exception, and that as a consequence, the fee of the reserved mineral remained in the vendor.[3]

The right of the grantee of the minerals, when not otherwise restricted, will sustain him in getting them; it will be presumed that the power of taking them was granted or reserved as a necessary incident.[4]

The Right to Enter and Work Mines.—The right to work mines is inseparable from the grant of them. The right to enter and work them is necessarily incident to the grant, without any expressed authority for that purpose. The grantee is entitled to do all that is necessary toward the convenient working of his mine, taking reasonable care to avoid injury to the property and rights of others, but he must not do more than the law will imply.[5] So the grantee can enter and penetrate the surface and use all the instrumentalities necessary to successfully prosecute the working of the mine.[6] A grantee acquired the right of mining and removing at pleasure, coal and other mineral from under the surface of certain land, the surface of which belonged to the grantor. The grantee entered upon the surface of the land, sunk a shaft, built a barn, stables, blacksmith shop, and made a pond or reservoir to receive water for running his machinery. He was careful to occupy no more of the surface than was necessary in the successful prosecution of his business. It was held that, although the grantee of the minerals owned no portion of the surface of the land, he had a right to occupy part of the surface and sink a shaft and erect hoisting machinery

[1] Shep. Touch. 89; Comstock v. Johnson, 46 N. Y. 615; Voorhees v. Burbank, 55 N. Y. 98; Marvin v. Mining Co., 55 N. Y. 538; 11 Coke, 52a; Chest. Co. v. Lucas, 112 Mass. 424; Adams v. Briggs Co., 7 Cush. 361; White v. Foster, 102 Mass. 375; Cranch v. Puryear, 1 Rand. (Va.) 258.

[2] Caldwell v. Fulton, 31 Pa. St. 475.

[3] Thompson v. Mattern (Penn.), 9 Atl. Rep. 70; S. P. Whitaker v. Brown, 46 Pa. St. 197.

[4] Rowbotham v. Wilson, 8 H. L. Cas. 348.

[5] Collier on Mines, 58; Shep. Touch. 100; Doud v. Kingscote, 6 M. & W. 164; Rogers v. Taylor, 1 H. & Nor. 706; Elliott v. N. E. Railroad Co., 10 H. L. Cas. 333; Turner v. Reynolds, 23 Pa. St. 199; Bordwell v. Ames, 22 Pick. 333; Clark v. Duval, 15 Cal. 85; Bainbridge on Mines, 34; Railroad Co. v. Railroad Co., 75 Ala. 524.

[6] Rogers v. Taylor, 1 H. & N. 706; Hert v. Gell, L. R. 709; Morris v. Edgington, 3 Taunt. 39; Lawton v. Rivers, 2

at a convenient place.[7] Neither has the grantor any right, by erections upon the surface of the land, to enlarge the grantee's obligations.[8]

The grantee may occupy so much of the surface, and use such machinery and methods as are in ordinary use in such business, that may be reasonably necessary for the profitable prosecution of the work. He may keep pace with the progress of society and of modern improvements.[9] But the implied or incidental power of the grantee will warrant nothing beyond what is strictly necessary for the convenient working of the minerals. It will allow no use of the surface, no deposit upon it, to a greater extent or for a longer duration than will be necessary, and no attendance upon the land of unnecessary persons.[10]

A Way of Necessity.—A way of necessity exists when another cannot be made without unreasonable labor or expense. In determining this question, the jury may consider the comparative value of the land and the probable cost of such ways, and then the word "necessary" cannot be limited to absolute physical necessity. The way must be necessary, and the facts of each case must be determined whether it or any other easement thus claimed is necessary.[11]

Must Keep the Superincumbent Soil in its Natural State.—In removing the mineral care must be taken not to take away support for the surface and cause a subsidance. The mineral must be taken without injury to the support for the surface or superincumbent soil in its natural state.[12]

The relation of adjacent owner and those of superjacent and subjacent are alike; hence, subjacent owners may do beneath the surface what adjacent owners may do beside it. But the subjacent owner is not entitled to let down the surface or to injure the enjoyment of it in its natural state, with additions to it in buildings not ancient.[13] Where the surface of the land belongs to one party and the minerals to another, no agreement as to their several rights, the owner of the minerals must not remove them without leaving sufficient support to maintain the surface in its natural state.[14] The obligations to protect the superincumbent soil extends to the soil in the natural state, and no duty rests upon the grantee of the minerals or subjacent strata to support additional buildings in the absence of express agreement to that effect. But the mere presence of buildings or other structure upon the surface does not prevent a recovery for injuries to the surface, unless it is shown that the subsidence would not have occurred except for the presence of the buildings. If the subsidence would have occurred from the act, if no buildings had been upon the surface, then the owner of the minerals or mine is responsible for the damages, not only to the land itself, but to the buildings and other superstructures.[15]

The doctrine of lateral support does not apply as between owners of adjoining gold mining claims, where the process of working is to tear down the soil and wash it.[16] In Carlin v. Chappel,[17] it is held that the owner of the surface is entitled to actual support for his land. The facts are these: The owner conveyed the land in fee-simple, excepting and reserving all the underlying coal, with the right of mining, excavating and carrying away the same. Subsequently he granted the coal to another grantee with said privileges. It was held that the grantor's assigns of the coal were liable for damages occasioned to the surface owner by a subsidence caused by mining the coal. Because the mining was carefully done according to the usual practice of mining was no defense.

In another case the court lays down this doctrine: Damages resulting to another from the natural and lawful use of land by the owner, are, in absence of malice or negligence, *damnum absque injuria*.[18]

Mining Usuages and Customs.—The mining industry has its peculiar usuages and customs, which exist from necessity of the case, and are, therefore, a part of the law of nature, to which private and personal rights must defer.[19] When the legislature sanctions an act or custom it becomes the law, and relieves all liability caused by it in the absence of malice or negligence.[20]

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McCord, 445; Pettingill v. Porter, 8 Allen, 1; Bainbridge on Mines, 66, *et seq.*; Collier on Mines, 58.

7 Wordell v. Walson, 93 Mo. 107.

8 Hilton v. Whitehead, 12 Ad. & El. 734; Smart v. Morton, 5 El. & Bl. 30; McGuire v. Grant, 25 N. J. L. 356; Thurston v. Hancock, 12 Mass. 220; Charles v. Rankin, 22 Mo. 566; Lusala v. Holbrook, 4 Paige, 169; Rogers v. Taylor, 2 H. & N. 828; Farrand v. Marshall, 21 Barb. 409; Gaylord v. Nichols, 9 Exch. 702.

9 Marvin v. Mining Co., 55 N. Y. 538; Bainbridge on Mines, 63; Comstock v. Johnson, 46 N. Y. 615; Shep. Touch. 89.

10 Kaler v. Beaman, 49 Me. 207; Marvin v. Iron Co., 55 N. Y. 538.

11 Pettingill v. Porter, 8 Allen, 1; Screvem v. Gregorie, 8 Rich. 158; Ins. Co. v. Milnor, 1 Barb. 353; O'Rorke v. Smith, 11 R. I. 259; Bartlett v. Prescott, 41 N. H. 493; Plimpton v. Converse, 42 Vt. 712; Turnbull v. Rivers, 3 McCord, 131; Carbrey v. Wilson, 7 Allen, 364; McDonald v. Lindall, 3 Rawle, 492.

12 Richards v. Jenkins, 18 L. T. (N. S.) 437; Smart v. Morton, 5 El. & Bl. 30; Humphries v. Brogden, 12 Q. B. 739; Partridge v. Scott, 3 M. & W. 220; Brown v. Robin, 4 H. & N. 186; Morain v. Mining Co., 55 N. Y. 538; Wilms v. Jess, 94 Ill. 464; 34 Am. Rep. 242; Bainbridge on Mines, 35, 62, 63; Executors v. Iron Mnfg. Co., 42 N. J. Eq. 157; Rowbotham v. Wilson, 8 El. & Bl. 123; Harris v. Ryding, 5 M. & W. 60; Micklin v. Williams, 12 Exch. 259; Jones v. Wagner, 66 Pa. St. 429; Chapman v. Day, 47 L. T. (N. S.) 705; Love v. Bell, 9 L. R. App. Cas. 286.

13 Partridge v. Scott, 3 M. & W. 220.

14 Coleman v. Chadwick, 80 Pa. St. 81; Carlin v. Chappel, 101 Pa. St. 348; Wilms v. Jess, 94 Ill. 464; Harris v. Ryding, 5 M. & W. 59; Humphries v. Brogden, 12 Q. B. 173; Smart v. Morton, 5 El. & Bl. 30; Horner v. Watson, 29 P. F. Smith, 251; Jones v. Wagnor, 10 P. F. Smith (Penn.) 429; Zinc Co. v. Franklinite Co., 13 N. J. Eq. (2 Beasley's Ch.) 312.

15 Wood on Nuisances, § 201; Wilms v. Jess, 94 Ill. 464; Brown v. Robins, 4 H. & N. 185; Austin v. Railroad, 25 N. Y. 338; Hamer v. Knowles, 6 H. & N. 459; Shoine v. Stokes, 8 B. Mon. (Ky.) 453; McGuire v. Grant, 25 N. J. L. 356.

16 Hendricks v. Mining Co., 58 Cal. 190; S. C., 41 Am. Rep. 257.

17 101 Pa. St. 348.

18 Coal Co. v. Sanderson, 113 Pa. St. 126. See leading case, Yandes v. Wright (Ind.), 9 Cent. L. J. 348.

19 Rogers v. Brenton, 10 Q. B. 26; Cariyon v. Lowring, 1 H. & N. 784; Atchison v. Peterson, 20 Wall. 507; Irwin v. Philips, 5 Cal. 140; Sanders v. Clark, 106 Mass. 33; Jones v. Wagnor, 16 P. F. Smith (66 Pa. St.) 429.

20 Commonwealth v. Reed, 10 Casey, 275; Williams v. Railroad Co., 18 Barb. 222; Mazette v. N. Y., 3 E. D. Smith, 98; Vaughan v. Railroad Co., 3 H. & N. 742; Railroad Co. v. Yeiser, 8 Pa. St. 366; Turnpike Co. v. Railroad Co., 54 Pa. St. 345; Railroad Co. v. Yerger, 73 Pa. St. 121.

ESTOPPEL—EQUITABLE ESTOPPEL—BOUNDARY—ACQUIESCENCE—MISTAKE—FEME COVERT.

GALBRAITH V. LUNSFORD.

Supreme Court of Tennessee, October 18, 1888.

Estoppel—Boundary—Acquiescence—Mistake.—Where A, by mistake, and in ignorance of the true line between his land and that of his neighbor, B, clears and incloses a portion of B's land, thus establishing a false boundary, which B, also by mistake, recognized as the true line, and he and his heirs acquiesced in it as such, and A builds a house upon the land so taken possession of by him: *Held*, that the heirs of B are estopped by their acquiescences and laches from re-establishing the true line between the parties. Circumstances stated under which a married woman may be estopped by conduct, the doctrine of equitable estoppel applied to a party laboring under the disability of coverture.

FOLKES, J., delivered the opinion of the court: This is an ejectment bill, the disposition of which was dependent upon a question of boundary. After answer and proof, the cause was submitted to Mr. Jerome Templeton, a solicitor of this court, as an arbitrator, who was "to hear and decide the same according to the law and the evidence." The award was to be in writing, and was to be made the decree of the court. The arbitrator presented his award, wherein was stated his findings of fact and of law, adjudging that the bill should be dismissed. Complainants excepted to the award, upon the ground that the arbitrator manifestly undertook, as he was required by the submission, to decide the case according to law; but that he had misconceived the law, and determined the case contrary thereto, upon the facts as found by him. The chancellor overruled the exceptions, and entered a final decree, making the award the judgment of the court. Complainants have appealed, assigning as error the action of the court in refusing to set aside the award, and in entering decree thereon. Under the submission the arbitrator was judge of the facts and the law, and was not required to give the grounds of his decision; in which event it would have been presumed that he had decided according to law. But, having stated his findings of fact, it was proper for the court to determine, on the exceptions presented, whether the conclusions of law announced by the arbitrator were warranted by the facts as found in a case where, by the terms of the submission, the award was to be in accord with the law. Powell v. Riley, 15 Lea, 153. The proof is not in the record, having properly been omitted, inasmuch as no question was made—if, indeed, any could have been made—as to the correctness of the conclusions of fact reached by the arbitrator. We are therefore to consider only the question propounded in the exception to the award, to-wit, that the deductions of law upon the facts as found are contrary to law.

The complainants, in support of their exceptions in the court below, now advance the following propositions in their assignments of error in this court: (1) "A line which could be easily ascertained by survey, and which had been known, and was lost or overlooked by mutual mistake, was and is not a doubtful line, that could be agreed upon or fixed, or become the true line, and binding by recognition, because void under the statute of frauds." (2) "Recognition of a line under a mistake of fact, where it was mutual, and either could have discovered the mistake by survey or otherwise, is not binding on either party, and neither party can set up the mistake against the other, by way of estoppel or otherwise; as mistake is as much that of one as the other, and fault, if any, is equal; and, besides, one's admission, made under mistake, will be relieved against in equity, more especially when mistake is mutual." (3) "Recognition of a line, not the true one, will not divest title to land out of a married woman nor minor, by estoppel or otherwise, as a married woman cannot be divested or part with title to land in that way; but more especially when it was by mistake of fact, as well upon the part of her adversary as that of her own, and when either could have easily discovered the mistake; nor is such married woman or descendant estopped to set up the truth, and recover accordingly; and more especially in a court of equity."

Robbed of their verbiage, the assignments of error are to the effect: (1) That the line or boundary, under the facts as found by the arbitrator—there being, as assumed by the assignments, no *bona fide* doubt, as to the true line, entertained by both parties—was not such a doubtful boundary as could be established by parol or acquiescence. (2) That the doctrine of equitable estoppel does not apply at all to the facts as found. (3) And, if applicable, it cannot be effectual, as against married woman.

Before disposing of these propositions, let us see what are the findings of the arbitrator, as shown by the award itself. We quote:

"Without going into the details of the proof, I find as follows:

"(1) The south boundary line of grant No. 18,417, to Wm. Cox, issued October 3, 1833, is the line from F to E in plot (Exhibit A) to the deposition of F. W. Galbraith. I further find that, as an original proposition, the north boundary line of the 250 acre tract—Wm. Cox to Jacob Pate, September 22, 1814—was the line from I to T, on same plot; and in 1833, when said grant was issued, the two tracts adjoined the lines here above described—being the same so far as the latter extended, and being the dividing line of the tracts. I add that, if I am mistaken as to the true south boundary of said grant, the result would be the same, because the deed—Geo. M. Combs to Wm. Cox, February 10, 1814—covered both tracts, and both parties to this suit derive title from Wm. Cox; and I am convinced the north boundary line of the 250 acre tract is the line I to T; that is, if not under said grant, certainly under the Combs

deed, so far as these parties are concerned, Wm. Cox owned the land in controversy.

"(2) I find that somewhere between August 11, 1846, and March 28, 1857—that is, while Presley S. Chesher owned the 250 acre tract, or prior to August 11, 1846—said dividing line was lost, or at least its location became doubtful. As a consequence, Chesher, between the point, I, and the New Market road, on said plot, cleared and inclosed the land up to and along the line from O to P on said plot, being the disputed line, as defendants claim it. Chesher did this under a claim of right, which, I infer from the circumstances, he thought that was his line. There is a market line there, not as old as the line from F to E, but still an old line. Further, B. F. McFarland and wife, Sarah, M. L. McFarland, a daughter, and the vendee of Wm. Cox, made the same mistake. They either forgot or never knew where the true dividing line was, and they clearly recognized the line from O to P as the dividing line between them and Chesher. I find no evidence that Mrs. McFarland ever recognized said last named line before her marriage. The deed to her from her father, containing the boundaries of said grant, is dated April 16, 1841, and conveys to her by her maiden name. Her marriage was subsequent, but the date does not appear. On the occasion, while John E. Hopkins owned the 82 acre tract, being the northern portion of the 250 acres—that is, after, November 3, 1866, and prior to 1869, when Mrs. McFarland died—she and John E. Hopkins went along the Chesher fence, along the line from O to P, talking about a trade as to Mrs. McFarland's land north of said line. She then recognized said line as the dividing line between her and Hopkins. This is cited as showing the recognition of said line, as defendants claim it, was not by B. F. McFarland only, but also by his wife. This recognition extends as far back as 40 years ago, or to 1848. In 1870 the heirs at law of Sarah M. L. McFarland, deceased, recognized the same line, O to P, when they partitioned among themselves the land inherited from their mother. When John Neal bought the 82 acre tract from B. F. McFarland, November 3, 1863, and when Hopkins bought the same from Neal, in 1866, said line, O to P, was the dividing line, being lived up to and recognized by McFarland and wife; and we may assume that both Hopkins and Neal bought with that understanding, well justified by the conduct of McFarland and wife. In 1870 the commissioners making partition did the locating of lines; but that only shows the mistake about the division line had become the understanding of the neighborhood. By accepting the partition, the heirs showed themselves ignorant of any mistake, so long had it (the line) been recognized. In 1873, John E. Hopkins, desiring to build a new dwelling house, procured the division line to be run by J. P. Galbraith, the husband of one of the McFarland heirs, who showed him where to build. Several other of the McFarland heirs were then at home in the neighborhood, and must have known of the building of the house, which was on their land, as they claim it now; but was on Hopkins' land, and just south of the division line, as they must have known Hopkins claimed it. To say the least of it, they were silent when they should have spoken. In 1877, R. M. Barton, Jr., and wife, Jennie M. Barton, the latter being one of the McFarland heirs, by deed called for the Hopkins division line from O to P. In July, 1877, Barton and wife sold the residue of the land partitioned to the latter to Wm. Galbraith; and some time afterwards, and prior to June, 1882, when Wm. Galbraith filed his bill against John E. Hopkins, the discovery was made that the line, so long recognized and lived up to on both sides as the true division line—that is, the line from O to P—was a mistake, and that the true line was from F to E or from 3 to J on said plot. The line from O to P never was consistent with the second call, 'thence north ten poles to a stake,' or with the fourth call, 'thence north forty-four poles to a stake,' in the deed from McFarland to John Neal, made in 1863. Nor was the same consistent with the calls of the deed from Wm. Cox to Jacob Pate, made September 22, 1814; nor was the same consistent with the oldest marked line on the ground. An accurate survey, at any time, ought to have discovered the true line. But so it was, the parties on both sides the line made a mutual mistake, without taking the trouble of a survey, on which they acted from sometime prior to 1848 to sometime after 1877. After so long a public acquiescence, and so many public acts, some by solemn deeds of record on the part of Sarah M. L. McFarland, her husband, and her heirs, under the influence and with the knowledge of which strangers have bought the adjoining land, and built a valuable house thereon worth many more times the value of land involved, can the McFarland heirs now be heard to complain of said mistake, and be allowed to correct the same? 'When the true locality of the line is doubtful, such acts are regarded as furnishing evidence that the line so recognized is the true line; nor are either of the parties at liberty afterwards to abandon such line although the line should afterwards be ascertained at a different place. Gilchrist v. McGee, 9 Yerg. 458, 459, Green, J. See, also, Merriwether v. Larmon, 3 Sneed, 446, 448. In the application of the principle of equitable estoppel, there is no exception in the case of married woman. 2 Herm. Estop. 1232. See, also, Howell v. Hale, 5 Lea, 405; 2 Pom. Eq. Jur. §§ 814–818; Crittenden v. Posey, 1 Head, 320; Stephenson v. Walker, 8 Baxt. 289. And the doctrine applies to infants having such intelligence as to enable them to comprehend the import of their conduct. Barham v. Turbeville, 1 Swan, 438. If this authority is doubted, still the only infant affected is Mrs. Barton; who with her husband, after her majority, ratified her former recognition of the line so long lived up to. I do not think the case of Wm. Galbraith v. John E. Hopkins, is *res adjudicata*, because: (1) complainants in this cause (except Bar-

ton's wife) were not parties to that suit; (2) the land involved here was not involved in that suit. The subject-matter was not the same. Being clear in my convictions above expressed, without discussing the question of the statute of limitations, I decide, having considered the case as arbitrator, according to the submission made in the case, that complainants' bill be dismissed, with costs. [Signed] JEROME TEMPLETON."

We have given the entire award, so that it may be seen what were the findings of fact and of law. The award must be taken as a whole, and not in detached sentences. It will not do to cull out words here and there, and from them argue that the parties knew where the true line was. The mutuality of the mistake, and the ease with which the parties might have discovered the same, had they taken the old deeds and procured the services of a competent surveyor, does not render it any the less a mistake. The fact still remains that there was an honest ignorance of the whereabouts of the true line, and a *bona fide* recognition of the line indicated on the plot as O to P. If, with full knowledge of the true line, another be fixed by verbal agreement, such agreement is within the statute of frauds, and consequently void; but, where there is doubt or ignorance as to the true locality of the line, a parol agreement, fixing the line between adjcining owners, is not within the statute; and, where satisfactorily established, will be enforced by the courts, notwithstanding it may afterwards be demonstrated that the agreed line was erroneously fixed. And such adjustment may be shown, as well by circumstaces and recognition, as by direct evidence of a formal agreement, when parties have acted thereon. Houston v. Matthews, 1 Yerg. 116; Gilchrist v. McGee, 9 Yerg. 458; Merriwether v. Larmon, 3 Sneed, 451; Lewallen v. Overton, 9 Humph. 76; Rogers v. White, 1 Sneed, 69; Riggs v. Parker, Meigs, 49; Yarborough v. Abernathy, *Id.* 420.

The cases on this subject are numerous in this State, and citations might be multiplied; but they clearly make the distinction, and establish the principals as stated above. This being so, it is not difficult to apply them to the findings of fact made by the arbitrator in the case at bar. We have admissions and declarations, we have conveyances made, and partitions had, calling for the line O to P. We have long acquiescence on the part of complainants, and those under whom they claim, coupled with the expenditure of money by defendant in building improvements upon the property in dispute, largely in excess of the value of the land itself, induced not only by what had long been the understanding of the parties as to the location of the line, but by positive pointing out of the line, with knowledge that the improvements were then about to be made. And during all this time we have absolute ignorance on the part of the adjoining owner as to the true line; ignorance none the less absolute by reason of the fact that, in the opinion of the arbitrator, it might have earily been removed by a survey. There was no survey, and the honest ignorance remained, until shortly before the filing of the bill in this cause. This is not a case of silence, but of numerous affirmative acts and admissions that were calculated to and did influence the conduct of defendants, and which acts and admissions are inconsistent with the claim of the title now sought to be set up. The facts as found would seem to make out a case of estoppel, unless the disability of coverture prevents the application of this doctrine, as is strenuously insisted upon by the learned counsel for complainants. Let us see how this is. The contention is that, as a married woman cannot, in reference to her lands, bind herself by title-bond, power of attorney, contract of sale, or even a deed, without privy examination, and certificate of acknowledgment in a prescribed form showing that it was done freely, voluntarily, and understandingly, it would be an anomaly in the law to hold that she might part with her title indirectly, when she had no purpose to do so, and when, instead of doing so freely, voluntarily, and understandingly, she was actually in ignorance, or laboring under a mistake of fact. And cases are cited which seem to sustain the contention. It must be admitted that the cases on this subject are to a certain extent conflicting. But much of the difficulty and confusion is due to a failure to observe the distinction between the cases which seek, by the doctrine of estoppel, to validate those contracts of a married woman which by law are declared void, and the cases where, in the absence of any contract, and independent of any contract or agreement, her conduct has been held to prevent her from asserting what would otherwise be a right. To the former class belongs the case of Dodd v. Benthal, 4 Heisk. 601. And the language of the judge delivering the opinion in that case, at page 607, where he says: "The complainant being both an infant and *feme covert* at the time of the execution of the deed in question, no act of affirmance or disaffirmance *in pais* on her part during coverture could be binding upon her," etc.—is correct when confined to a contract of a person under disability, which by law is void in consequence of such disability. To the latter class above referred to belongs the case of Howell v. Hale, 5 Lea. 405. Here the conduct of the married woman, independant of any contract, operates to estop her in the same manner and to the same extent as if she were a *feme sole*. So in the case at bar, while there are facts and circumstances upon which a contract might be implied that would be binding upon a person *sui juris*, yet there are also such admissions, statements, and conduct on the part of the complainants and their ancestor as are amply sufficient to create an estoppel entirely independent of, and altogether outside of, any idea or claim of a contract. Mr. Pomeroy says "that while, upon the question how far the doctrine of equitable estoppel by conduct applies to married women, there is some conflict among the decisions, the tendency of modern authority, however, is

strongly toward the enforcement of the estoppel against married women, as against persons *sui juris*, with little or no limitation on account of their disability;" and that the decisions to the contrary seem to be in opposition to the general current of authority. Modern English cases, as well as American, are cited to sustain the text. Section 814, and notes. The case of Morrison v. Wilson, 13 Cal. 495, relied on so confidentially by counsel for complainants, seems to not only deny the application of an estoppel *in pais* to a married woman, but goes so far as to hold that affirmative fraud on her part will not effect that result. It is sufficient to say of this case that it not only loses sight of the distinction referred to as to the defective execution of a contract, but is directly opposed to our own adjudged cases, so far as the element of fraud is concerned. The doctrine of estoppel has, by courts of this State, been applied to married women and infants. Thus, in Howell v. Hale, 5 Lea, 405, she was held estopped by matter *in pais*. She had by her conduct induced Thornhill to purchase the mortgage debt on her land, leading him to believe that the land should stand liable therefor. This court held her estopped by her conduct to make the defense of said mortgage, whether she might have done so or not, as against the original mortgagee. In Cooley v. Steele, 2 Head, 606, we have a clear case of estoppel *in pais* applied to a married woman. She had, in a deposition, made a statement, as to title to certain shares, contrary to what she there asserted in the case before the court. This court said: "Complainant would be clearly entitled, upon well-established principles, to the relief sought, but for the estoppel created by her oath in the before-mentioned deposition." To the same effect is Pilcher v. Smith, *Id.* 208, where it is said: "The legal disability of coverture carries with it no license or privilege to practice fraud or deception on other persons." Estoppel *in pais* has also been applied to infants by this court. Barham v. Turbeville, 1 Swan, 437; Adams v. Fite, 3 Baxt. 69. In the latter case the court, after finding the weight of the proof in favor of the complainant having been of age at time of the execution of the deed, continuing, said: "Both on the ground of long acquiescence, and of the concealment of the fact that he was not of age, when complainant had good reason to know that Ewing was trading with him as *sui juris*, complainant is repelled, even if he was in fact only twenty years of age when he made the deed." It is true that in the case of Barham v. Turbeville the infant was not merely silent, but actively proclaimed his father's title to the property he subsequently sued for; and the court puts the estoppel upon the ground of actual and purposed fraud, which was right and proper, under the facts of the case. But, so far as the opinion in this case undertakes to hold that actual and positive fraud, at the time of the act set up as constituting the estoppel, it is *obiter* and unsound, as we shall presently undertake to show.

It is also urged that actual fraud must exist before an estoppel can be maintained against one *sui juris* and a *fortiori* before it can be applied to a married woman, if against the latter it can be invoked at all. It is true that there is a theory which makes the essence of equitable estoppel to consist of fraud; but this theory is not sustained by principle nor authority. There are many well-settled cases of estoppel familiar to the courts of equity, which do not rest upon fraud; and instances are admitted, even by the courts, which maintain this theory, which cannot be said to involve any element of fraud, unless by a complete perversion of language and misuse of terms. The confusion to be found in some of the books on this subject is due doubtless to the fact that the fraud referred to has its origin in the effort afterwards to set up rights contrary to the conduct of the party, although at the time of the act constituting the estoppel there was the most perfect good faith. The term, as used in such cases, is, as Mr. Pomeroy expresses it, virtually synonymous with "unconscientious" or "inequitable." It is in this sense that it may be said that it is a fraud or fraudulent to attempt to repudiate the conduct which has induced the other party to act, and upon which the estoppel is predicated; but it is entirely another thing to say that the conduct itself—the acts, words, or silence of the party—constituting the estoppel must be an actual fraud, done with the intention of deceiving. It may therefore be safely said that although fraud may be, and often is, an ingredient in the conduct of the party estopped, it is not an essential element, if the word is used in its commonly accepted sense; and the use of the term is unnecessary, and often improper, unless applied to the effort of the party estopped to repudiate his conduct, and to assert a right or claim in contravention thereof. The best-considered cases are in accord with the views above expressed. Bank v. Bank, 50 N. Y. 575; Waring v. Somborn, 82 N. Y. 604. And although the earlier Pennsylvania decisions generally leaned strongly in favor of the theory that an actual fraud is of the essence of every such estoppel by conduct, it is worthy of note that in the late case in that State of Bidwell v. Pittsburg, 95 Pa. St. 412, it is said: "It is not necessary that the party against whom an estoppel is alleged should have intended to deceive. It is sufficient if he intended that his conduct should induce another to act upon it, and the other relying on it, did so act." 2 Pom. Eq. Jur. §§ 804, 805, *et seq.* The case of Brant v. Coal Co., 93 U. S. 326, pressed upon by counsel for complainant as establishing the contention that fraud is an essential element in the application of the doctrine of estoppel, and that it is essential that the party invoking the estoppel was himself not only destitute of the knowledge of the true state of the title, but also of any convenient or available means of acquiring such knowledge, merits special mention. In addition to what we have already said as to the first proposition, we will be content to adopt Mr.

Pomeroy's note upon this case, where, after quoting freely of the opinion, he says: "With great deference to the opinion of so able a judge, I think his error in this passage is evident. It consists in taking a special rule, established from motives of policy for a particular condition of fact, and raising it to the position of a universal rule. Where an estoppel by conduct is alleged to prevent a legal owner of land from asserting his legal title, courts of equity, in order to avoid the literal requirements of the statute of frauds, were driven to the element of fraud in the conduct as essential. See the text, sections 805-807. The passage quoted from Judge Story is dealing with this long-setted rule of equity, and not with the subject of equitable estoppel in general. When this special rule is made universal, its inconsistency with many familiar instances of equitable estoppel becomes apparent, and Judge Field is forced to escape from the antagonism by denying that these instances do in fact belong to the doctrine. If this conclusion be correct, then some of the most important and well-settled species of the estoppel, uniformly regarded as such by text-writers and courts, must be abandoned, and the beneficient doctrine itself must be curtailed in its operation to one particular class of cases. This result is in direct opposition to the tendency of judicial decisions, and of the discussion of text-writers." See note 1 to section 806, Pom. Eq. Jur., and cases there cited. It is worthy of notice, also, that, in the opinion referred to, Judge Field quotes approvingly from the Pennsylvania case of Hill v. Epley, 31 Pa. St. 334, language which is practically, to all intents, an abandonment of the extreme position supposed to be maintained in the *Brant Case*. The language referred to is: "The primary ground of the doctrine is that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted." The element of fraud is essential either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up; so that at last the difficulty seems to be in the use of terms, rather than in the true principles controlling the doctrine under consideration. As to the second proposition for which the *Brant Case* is cited, it is sufficient to say that it does not sustain the position that the mutuality of the mistake, or the possibility of having discovered it, prevents the application of the doctrine of estoppel. It merely asserts the familiar rule that where the party setting up the estoppel knew the true condition of the title, either in fact or in contemplation of law, the doctrine will not avail him; the fact being in that case, as shown in the opinion, that "he knew he was obtaining only a life-estate by his purchase."

This opinion is already too long to allow further elaboration on the question of estoppel under the facts of this case. It will, however, not be out of place to add that I find nothing in the numerous reported cases in this State, from Patton v. McClure, Mart. & Y. 339, down to Allen v. Westbrook, 16 Lea, 251, that makes wilful fraud on the part of the party sought to be estopped, in the act constituting the grounds of the estoppel, essential to the application of the doctrine. We hold, therefore, that there is, in the case at bar, on the facts as found by the arbitrator, every element of an equitable estoppel, and complainants must be repelled. The disability of coverture is not sufficient to defeat this result. Let the decree of the chancellor be affirmed, with costs.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ACTION—Jurisdiction—Federal Courts. —— Under the Virginia Code an administrator bringing an action for damages for causing the death of his intestate should bring it in his own name. Therefore, when the administrator and defendant are citizens of different States the federal court has jurisdiction even though the intestate was a citizen of the same State as the defendant.— *Harper v. Norfolk & W. R. R.*, U. S. C. C. (Va.), Nov. 5, 1887; 36 Fed. Rep. 102.

2. ADMIRALTY—Costs - Witnesses. —— Where two libels were filed against the same vessel for two losses occasioned by the same disaster, but the two cases were never consolidated: *Held*, that double mileage and attendance should be allowed though the witnesses were sworn but once and their testimony was read in both cases.— *The Vernon*, U. S. D. C. (Mich.), July 19, 1888; 36 Fed. Rep. 113.

3. ADVERSE POSSESSION — Inclosure — Boundaries — Instruction. —— Where a party claimed land by adverse possession, relying upon actual inclosure by a fence temporary in its nature: *Held*, that the jury should have been instructed that he must show actual adverse possession by actual permanent inclosure. — *Hockmoth v. Des Grand Camps*, S. C, Mich., Oct. 12, 1888 39 N. W. Rep. 737.

¶ 4. AMENDMENT—Cost—Scandalous Words — Pleading. —— After a motion to strike out scandalous words

from a reply, plaintiff may amend his reply without cost, omitting the scandalous words.—*Sutton v. Wegner*, S. C. Wis., Oct. 9, 1888; 39 N. W. Rep. 775.

5. APPEAL—Demurrer—Striking Off. —— Wisconsin laws do not authorize an appeal from an order refusing to strike a demurrer for frivolousness. —— *Stevens v. Sholes*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 348.

6. APPEAL—Dismissal—Second Appeal.——An appeal should be dismissed, when on a former appeal the judgment was affirmed for failure to perfect the appeal, though appellant had informed the appellee that he intended to withdraw such first appeal, but did not dismiss it in court. — *Tinelock v. Friendship Lodge*, S. C. Iowa, Oct. 6, 1888; 39 N. W. Rep. 654.

7. APPEAL — Form of Action. —— Upon appeal an action will be tried as a suit in equity, if it was so treated in the trial court. — *Bryant v. Fink*, S. C. Iowa, Oct. 16, 1888; 39 N. W. Rep. 820.

8. APPEAL—Instructions— Review. —— Instructions cannot be assigned for error on appeal, unless the alleged error was presented in the motion for a new trial.— *Sherwin v. O'Connor*, S. C. Neb., Oct. 10, 1888; 39 N. W. Rep. 620.

9. APPEAL— New Trial — New Evidence. —— The determination of the trial court on the matter of granting a new trial will rarely be disturbed on the question of the use of diligence in discovering testimony, since such matters are peculiarly within the knowledge of the trial court. — *Smith v. Groves*, S. C. Neb., Oct. 3, 1888; 39 N. W. Rep. 597.

10. APPEAL—Record— Abstract. —— Where the abstracts do not show that any appeal has been taken or attempted, the supreme court has no jurisdiction. — *Donnelly v. Cedar County*, S. C. Iowa, Oct. 18, 1888; 39 N. W. Rep. 828.

11. APPEAL—Record—Errors.——Where the question, whether the contract sued on had been rescinded, was not made an issue in the pleadings and its submission to the jury was not asked, its non-submission cannot be alleged as error, though there be evidence tending to show such rescission. — *Kenyon v. Kenyon*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 361.

12. APPEAL—Review—Practice—New Trial. —— Where the court refuses to permit the introduction of certain evidence and decides adversely to the party offering it, he is not entitled to an appeal unless he has made a motion for a new trial.— *Dunham v. Courtnay*, S. C. Neb., Oct. 17, 1888; 39 N. W. Rep. 784.

13. APPEAL— Weight of Evidence. —— The verdict is not so clearly and manifestly against the weight of the evidence as to require a reversal by the supreme court. — *Seiberling v. Brauer*, S. C. Neb., Sept. 25, 1888; 39 N. W. Rep. 591.

14. APPEAL — Weight of Evidence. —— A judgment will not be reversed where the evidence is conflicting, if there is enough to sustain the judgment, if it were uncontradicted. — *Witter v. Hoover*, S. C. Neb., Oct. 10, 1888; 39 N. W. Rep. 619.

15. APPEAL— Weight of Evidence. —— The decisions of the trial court will never be disturbed, unless they are against a clear and satisfactory preponderance of evidence. — *Bruce v. Miller*, S. C. Wis., Oct. 9, 1888; 39 N. W. Rep. 554.

16. ASSIGNMENT FOR BENEFIT OF CREDITORS — Accounting — Assignee. —— Circumstances stated under which it was held that order requiring an assignee for the benefit of creditors who had made a final settlement to account over and to submit to an examination, was properly dismissed.— *In re Baker*, S. C. Wis., Oct. 9, 1888; 39 N. W. Rep. 764.

17. ASSIGNMENT FOR CREDITORS — Partial. —— The common law right of an insolvent to make a partial assignment for benefit of creditors is not affected by Code Iowa § 2115. — *Loomis v. Stewart*, S. C. Iowa, Oct. 6, 1888; 39 N. W. Rep. 660.

18. ATTACHMENT—Deed — Record. —— A prior unrecorded deed is good as against an attachment, though the attachment creditor had no notice of the deed.— *Moorman v. Gibbs*, S. C. Iowa, Oct. 18, 1888; 39 N. W. Rep. 832.

19. ATTACHMENT—Dissolution—Disclaimer. —— On a motion to dissolve, where plaintiff had levied two attachments, his counsel stated that plaintiff claimed nothing under the second writ: *Held*, that such statement was a confession of error, and the second writ should have been discharged. — *Kuehn v. Paroni*, S. C. Nev., Oct. 16, 1888; 19 Pac. Rep. 273.

20. ATTACHMENT—Replevin—Bond— Exemption. —— In an action against an officer for taking an insufficient bond for the replevin of attached property, the officer may show that the property was exempt from attachment. — *People v. Lee*, S. C. Mich., Oct. 12, 1888; 39 N. W. Rep. 731.

21. ATTORNEY—Retainer— Extent. —— One who has contracted to act as attorney for a partnership, cannot claim to be employed by it in a contest among the beneficiaries of a trust, wherein the firm is incidentally involved in the capacity of trustee.—*Cutcheon v. Loud*, S. C. Mich., Oct. 5, 1888; 39 N. W. Rep. 569.

22. BANKS—Insolvency Draft—Proceeds. —— A draft sent to a bank for collection being paid, a note that the proceeds were the property of the sender, was placed with the bank's cost; the bank closed the next day: *Held*, that the sender of the draft could recover. — *First Nat. Bank v. Armstrong*, U. S. C. C. (Ohio), May 10, 1888; 36 Fed. Rep. 59.

23. BILLS AND NOTES—Parties — Parol Evidence. —— Where a note is signed by the name of a corporation, and below is signed by the president and secretary thereof with their titles, parol evidence is not admissible to show that it is the note of the corporation alone.— *Heffner v. Brownell*, S. C. Iowa, Oct. 4, 1888; 39 N. W. Rep. 640.

24. BOND—Joint Obligors—Notice.—— Circumstances stated under which all the co-obligors of a bond secured by a mortgage are liable for its payment, though the grantee of the land had paid the amount to the agent after the revocation of the latter's authority, no notice being given to the obligors. — *Green v. Rick*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 497.

25. BONDS—Official — Discharge of Sureties. —— The failure of the supervisors to require the clerk of the district court to produce and account for funds before entering on his second term, and a false representation that such duty had been performed, does not release the sureties on the clerk's official bond for his second term for a defalcation occurring after the approval of the bond.— *Palmer v. Woods*, S. C. Iowa, Oct. 8, 1888; 39 N. W. Rep. 668.

26. BOUNDARIES—Courses—Monuments.—— In questions of boundaries, courses and distances must yield to fixed monuments.—*Walrod v. Flanigan*, S. C. Tex., Oct. 5, 1888; 39 N. W. Rep. 645.

27. CARRIERS — Acts of Servants — Liability. —— A railroad company is liable for the acts of those in charge of one of its trains in expelling a passenger from it. — *Cain v. Minneapolis, etc. R. R.*, S. C. Minn., Oct. 15, 1888; 39 N. W. Rep. 635.

28. CARRIERS—Regulating Charges—Equity. —— The Iowa law, allowing the State board of railroad commissioners to regulate the rates for railroad charges, is not a delegation to legislative authority, and, where such rates will prevent a railroad from earning the interest on its bonds and something for dividends, equity will restrain their enforcement, and a bill therefor against such board is not a suit against the State.— *Chicago, etc. R. R. v. Railway Commrs.*, U. S. C. C. (Iowa), July 27, 1888; 35 Fed. Rep. 866.

29. CARRIERS—Regulating Charges— Reasonable Rate. —— State railroad commissioners cannot enforce a schedule of rates for switching cars in a city, which fixes the compensation at less than the actual cost to the railroad company for the work. — *Chicago, etc. R. R. v. Becker*, U. S. C. C. (Minn.), July 28, 1888; 35 Fed. Rep. 883.

30. CARRIERS OF PASSENGERS — Injuries — Dangerous Approaches. —— Railroads are bound to keep in a safe condition their platforms, approaches and station grounds, and it is negligence on their part to leave an unguarded hole in a passage way at a station.— *Green v. Penn. R. R. Co.*, U. S. C. C. (Pa.), Oct. 14, 1887; 36 Fed. Rep. 66.

31. CARRIERS OF PASSENGERS — Lights—Stations.—— It is the duty of a railroad company to properly light the platform connected with its depot within a reasonable time before the arrival and departure of its trains, and they are liable for injuries resulting from neglect to do so. — *Grimes v. Penn. R. R. Co.*, U. S. C. C. (Ohio), April Term, 1888; 36 Fed. Rep. 72.

32. CHATTEL MORTGAGE—Filing— Foreclosing. —— A party claiming under a chattel mortgage filed in the office of the county clerk cannot withdraw the instrument from the office and proceed under the statute to foreclose.—*Ward v. Watson*, S. C. Neb., Oct. 10, 1888; 39 N. W. Rep. 615.

33. CHATTEL MORTGAGES — Redemption — Limitation. ——The statute of limitations does not begin to run against the mortgagor of chattels until the mortgagee's possession becomes adverse, though the debt secured is barred.—*Shoecraft v. Beard*, S. C. Nev., Sept. 4, 1888; 19 Pac. Rep. 246.

34. CHATTEL MORTGAGE—Refiling — Subsequent Mortgagee. —— One who takes a chattel mortgage within one year after the filing of a previous mortgage, is not a subsequent mortgagee in good faith, under How. St. Mich. § 6196, relative to renewal of the first mortgage. — *Wade v. Strachan*, S. C. Mich., Oct. 5, 1888; 39 N. W. Rep. 582.

35. CHATTEL MORTGAGE—Stock of Goods—Accounting. ——The rule stated as to the mode of accounting when the mortgagee takes possession of the mortgaged stocks of goods and continued the sales therefrom, and adds new goods thereto. — *Buir v. Dana*, S. C. Wis., Oct. 9, 1888; 39 N. W. Rep. 562.

36. COLLISION—Steam and Sail— Wheelsman. —— As a barkentine and steamer were approaching, the master of the former ordered the wheel starboarded, but by mistake the wheelsman ported the helm, which produced the collision: *Held*, that the sailing vessel was alone responsible for the collision. — *Carlisle v. The Pomona*, U. S. C. C. (N. Y.), July 10, 1888; 35 Fed. Rep. 921.

37. COMMISSIONERS—United States—Docket Fees.—— Commissioners of the United States circuit court are entitled to the same docket fees as are allowed clerks of such courts. — *Bell v. United States*, U. S. D. C. (Ala.), Nov. 25, 1887; 35 Fed. Rep, 889.

38. COMMISSIONERS— United States— Fees. —— Concerning the fees, which United States commissioners are entitled to.—*Barbe v. United States*. U. S. D. C. (Ala.), Nov. 23, 1887; 35 Fed. Rep. 886.

39. CONTRACT— Building Contract — Quantum Meruit. —— Where under a building contract the contractor leaves his work unfinished he can be only entited upon a *quantum meruit*, to the contract price, less an amount reasonably sufficient to complete the building.— *Phelps v. Beebe*, S. C. Mich., Oct. 12, 1888; 39 N. W. Rep. 761.

40. CONTRACTS — Conditions — Performance. —— A agreed to do the plumbing in B's house for a fixed sum and to produce certificates as to his work before payment. Before A could procure the required inspection and certificates, B raised his house without A's knowledge and thereby injured and twisted A's work: *Held*, that it was not necessary for A to procure the certificate. — *Doyn v. Ebbesen*, S. C. Wis., Oct. 9, 1888; 39 N. W. Rep. 535.

41. CONTRACT — Maintenance and Support. —— Circumstances stated under which an aged and infirm woman, living with and cared for by her sister and her sister's family was held to have made an implied promise that those relatives should be remunerated for their care and trouble. — *Appeal of Lindsey*, S. C. Penn., Oct. 1, 1889; 15 Atl. Rep. 434.

42. CONTRACT—Mechanic's Lien—Bond— Public Buildings. —— A party who contracts to furnish a contractor for public works with cut stone is not a material-man, nor entitled to a mechanic's lien, he is a subcontractor for whose claims the principal contractor is bound upon his bond. — *Avery v. Ionia County*, S. C. Mich., Oct. 12, 1888; 39 N. W. Rep. 742.

43. CORPORATIONS— Stockholders — Book. —— The stockholders of a corporation, under Wisconsin law, have a right at all reasonable times to inspect its books containing the stock accounts and also its general accounts.—*State v. Bergenthal*, S. C. Wis., Oct. 9, 1888; 39 N. W. Rep. 566.

44. CORPORATIONS—Stockholders — Estoppel. —— In an action by a creditor of a corporation against its stockholders, the latter are estopped to deny the legality of the corporation, when they have acquiesced in its acts for years.—*Ross v. Bank of Gold Hill*, S. C. Nev., Sept. 25, 1888; 19 Pac. Rep. 245.

45. COSTS—Replevin—Justice of the Peace.——Under Wisconsin laws, a justice of the peace may require a plaintiff in replevin to give security for costs. — *Stark v. Small*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 359.

46. COST—Tender—Trespass.——Under the statute of Wisconsin, by which a defendant is authorized to offer to submit to judgment for an amount fixed by him, and if rejected and the plaintiff recovers no more than that amount, he can obtain no cost accruing after the offer. Under the statute an offer of a judgment for six cents is sufficient. — *Williams v. Ready*, S. C. Wis., Oct. 9, 1888; 39 N. W. Rep. 779.

47. COUNTIES—Contracts—Powers.——A contract for building a court-house provided that changes therein, increasing or lessening the costs, should be followed by like changes in the contract price, which was the full amount authorized by popular vote: *Held*, that any changes in the contract, in so far as they increased the liability of the county above the sum voted, were void. —*King v. Mahaska County*, S. C. Iowa, Oct. 3, 1888; 39 N. W. Rep. 636.

48. COURTS —Federal—Circuit — Citizenship Corporations. —— Under act of Congress, March 3, 1887, providing the United States circuit courts shall have original cognizance of a controversy between citizens of a State and foreign States, citizens or subjects, but that no civil suit shall be brought before such courts except in the district whereof the defendant is an inhabitant, a citizen of Mexico cannot sue a Connecticut corporation in a district of California, although defendant has an office and managing agent in such district.— *Denton v. International Co.*, U. S. C. C. (Cal.), July 30, 1888; 36 Fed. Rep. 1.

49. COVENANTS—Warranty— Taxes. —— A warrantor who is decreed to pay to his grantees damages for breach of warranty, is not entitled to claim as a set-off the amount of taxes paid by him on the land.— *Pierce v. Herrold*, S. C. Iowa, Oct. 13, 1888; 39 N. W. Rep. 815.

50. CREDITOR'S BILL—When Maintainable.—— A judgment creditor cannot maintain a bill to reach choses in action of the judgment debtor in the hands of third persons until execution on his judgment has been returned *nulla bona*.—*Vanderpool v. Notley*, S. C. Mich., Oct. 5, 1888; 39 N. W. Rep. 574.

51. CRIMINAL LAW—Appeal—Record. —— Under California law, a copy of the alleged charge of the court in a criminal case, verified by the shorthand reporter, upon which is indorsed the trial judge's refusal to certify to its correctness, is not a part of the record. — *People v. January*, S. C. Cal., Sept. 28, 1888; 19 Pac. Rep. 258.

52. CRIMINAL LAW—False Pretenses.—— A statement by defendant, that he had credit with the firm on which he drew the draft and that the draft would be honored, when he knew that he had no credit there and that the draft would not be honored, comes, under the California law, of defrauding by false pretenses.—*People v. Wasservogle*, S. C. Cal., Sept. 28, 1888; 19 Pac. Rep. 270.

53. CRIMINAL LAW—Flight of Accused. —— On a trial for assault the testimony of the sheriff as to his search for defendant, tending to show flight after the assault,

is admissible.— *People v. Fine*, S. C. Cal., Sept. 27, 1888; 19 Pac. Rep. 269.

54. CRIMINAL LAW— Former Jeopardy — Justice. —— An arrest examination and discharge before a justice of the peace is no bar to a second arrest and examination on the same charge. — *Er parte Fenton*, S. C. Cal., Oct. 9, 1888; 19 Pac. Rep. 267.

55. CRIMINAL LAW—Former Jeopardy— Reversal.—— A reversal upon appeal by defendant of a judgment of conviction upon an information for an attempt to commit burglary will not bar further prosecution thereon. — *People v. Travers*, S. C. Cal., Sep. 28, 1888; 19 Pac. Rep. 268.

56. CRIMINAL LAW—Indictment—Variance.——A conviction of the murder of Leong Chin will not be reversed, because the name was Leong Chung, when the record does not purport to contain all the evidence. — *People v. Leong Sing*, S. C. Cal., Sept. 24, 1888; 19 Pac. Rep. 254.

57. CRIMINAL LAW—Larceny — Intent. —— A owned property which he pledged to B for a debt. A worked for B, and, on B's refusal to pay him money for his services, openly took the property and pledged it to C. A was indicted for larceny: *Held*, that it was error not to allow A to show that B owed him money for his services enough to satisfy his debt to B.—*People v. Eastman*, S. C. Cal., Sept. 28, 1888; 19 Pac. Rep. 266.

58. CRIMINAL LAW—Misconduct of Counsel. — Where a prosecuting attorney furnishes liquor and cigars to members of the jury during the trial, the court may order a new trial after verdict.—*People v. Montague*, S. C. Mich., Oct. 5, 1888; 39 N. W. Rep. 585.

59. DEED—Attachment—Validity.——Case on attachment, where a deed absolute on its face was held valid in favor of an attaching creditor, as against equitable claimants of the attachment debtor. — *Wooldridge v. Miss. Valley Bank*, U. S. C. C. (Miss.), January Term, 1888; 36 Fed. Rep. 97.

60. DEED—Description — Monuments. —— A deed is good although the description is erroneous with reference to monuments, provided the further description locates the land with sufficient certainty.—*Benton v. McIntire*, S. C. N. H., July 19, 1888; 15 Atl. Rep. 413.

61. DIVORCE—Vacating Decree.——Courts of general jurisdiction have power to set aside or vacate decrees of divorce, after the term at which the decree was rendered, when obtained by fraud. — *Wisdom v. Wisdom*, S. C. Neb., Oct. 3, 1888; 39 N. W. Rep. 594.

62. EASEMENT— Private Way — Abutters. —— All the owners of lots abutting on a private alley have equal rights to its use as an easement. If the alley is vacated they will hold the soil as tenants in common. — *Ellis v. American, etc. Co.*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 494.

63. ELECTIONS—Voters — Mormons. —— The law requiring applicants for registration to take oath that they are not Mormons, is contrary to the constitution of Nevada. — *State v. Findley*, S. C. Nev., Oct. 8, 1888; 19 Pac. Rep. 241.

64. EMINENT DOMAIN—Appeal—Parties.—— Where in condemnation proceedings the award of compensation is made jointly to the owner and mortgagee, the owner may appeal without joining the mortgagee. — *Dixon v. Rockwell, etc. R. R.*, S. C. Iowa, Oct. 5, 1888; 39 N. W. Rep. 645.

65. EMINENT DOMAIN — Damages — Private Embankment.——Damages may be recovered in condemnation proceedings for the removal of a private embankment, leading on an unopened street to the owner's premises. —*Quigley v. Pennsylvania, etc. Co.*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 478.

66. ESTOPPEL — Advancement. —— Circumstances stated under which it was held that a son who was engaged in business with his father, having received certain money from his father, was estopped from denying that that money was an advancement made by the father out of his mother's estate.—*Appeal of Skinner*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 435.

67. EQUITY—Master's Report—Facts. ——Master's reports, under equity rule 76, need not state what facts he considers proved by the evidence, but he shall refer to and specify such state of facts, so as to inform the court of the state of facts used.— *McCormack v. Jones*, U. S. D. C. (W. Va.), May 27, 1886; 36 Fed. Rep. 14.

68. EQUITY—Pleading—Remedy at Law.—— In matters of equitable cognizance, the objection that the plaintiff has an adequate remedy at law, is waived, unless made by demurrer or answer.—*Sherry v. Smith*, S. C. Wis., Oct. 9, 1888; 39 N. W. Rep. 556.

69. EQUITY—Specific Performance— Public Lands.—— Equity has jurisdiction to enforce a claim against the United States to convey land under the act of 1887, and having attained jurisdiction may decree, without reference to the locality in which the public land may be situated.—*Montgomery v. United States*, U. S. C. C. (Oreg), Sept. 3, 1888; 36 Fed. Rep. 4.

70. EVIDENCE—Declarations— Vendor and Vendee.—— The acts and declarations of a vendor in possession after the sale are competent evidence against the vendee, on the question of the character and purpose of the sale. — *Neal v. Foster*, U. S. C. C. (Oreg.), Aug. 20, 1888; 36 Fed. Rep. 29.

71. EXECUTORS AND ADMINISTRATORS — Claim — Commissioners. —— Where a claim against an estate has been submitted to two commissioners who agree as to two items of the demand and disagree as to the third, an appeal by the claimant waives his right to have his claim acted on by the third commissioner. — *Smith v. Floyd's Admrs.*, S. C. Mich., Oct. 12, 1888; 39 N. W. Rep. 756.

72. FEES—United States Courts — Clerk — Supervisor. ——The clerk of the United States courts, being chief supervisor of election, should file and indorse each paper that comes into his possession officially, and he is entitled to fees therefor. It is not enough to make the indorsement of filing on the outside wrapper. — *Dimmick v. United States*, U. S. D. C. (Ala.), Nov. 23, 1887; 36 Fed. Rep. 82.

73. FRAUD—Fraudulent Conveyances—Evidence.—— Circumstances stated under which it was held that evidence tending to show a combination between a firm and certain of its creditors to cover up the assets of the partnership and the partners is admissible. — *Kline v. First Nat. Bank*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 433.

74. FRAUD—Parent and Child — Subsequent Creditors. ——Where a father having property and being clear of debt gives land to his daughter which she occupies, it is not subject to attachment or execution in favor of subsequent creditors of the father. — *Rock Island, etc. Co. v. Walrod*, S. C. Iowa, Oct. 12, 1888; 39 N. W. Rep. 811.

75. FRAUDS— Statute of — Contracts Relating to Land. —— Circumstances stated under which it was held that the evidence did not disclose such a state of facts relative to an alleged contract for the sale of lands which, under the statute of frauds, could go to the jury. —*Yerkes v. Perrin's Estate*, S. C. Mich., Oct. 12, 1888; 39 N. W. Rep. 758.

76. FRAUDULENT CONVEYANCES — Possession. —— Whether there has been an actual and continued change of personal property upon a sale thereof depends largely upon all the circumstances of the case. — *Tunell v. Larson*, S. C. Minn., Oct. 9, 1888; 39 N. W. Rep. 628.

77. FRAUDULENT CONVEYANCE—Preference—Consideration. —— A sale of a stock of goods for which the purchasers agree to pay off certain creditors of the vendor in full, certain others in part, and the balance as the seller may direct, is, in the absence of fraud, valid. —*Greene, etc. Co. v. Marshall*, S. C. Wis., Oct. 9, 1888; 39 N. W. Rep. 767.

78. FRAUDULENT CONVEYANCES — What Constitutes — Evidence.—— Where it appears in a suit by a creditor to reach certain land of his debtor, that the debtor had in fact paid for it, the property will be subjected to the payment of his judgments. — *Buford v. Cook*, U. S. C. C (Iowa), Aug. 31, 1888; 36 Fed. Rep. 21.

79. GARNISHMENT—Attachment—Levy. —— Garnishment attachment binds the property from the time of the service of the garnishment, and protects it from the subsequent levy of an execution in favor of third persons. — *Northfield, etc. Co. Sharpleigh*, S. C. Neb., Oct. 17, 1888; 39 N. W. Rep. 788.

80. GIFT—Donati Causa Mortis. ——The delivery of a bank book by the donor in her last illness, saying that if she died the money should go to her sister in Ireland, is not a complete *donati causa mortis*. — *Appeal of Walsh*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 470.

81. GUARANTY—Revocation—Death.——A sealed continuing guaranty by which the grantor guaranteed the payment of $2,000 to be loaned to his principal, is revoked by the grantor's death. — *Slagle v. Forneys' Exrs.*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 427.

82. GUARDIAN AND WARD—Accounting— Laches. —— Where a mother who was guardian for her daughter kept no accounts and made no accounting to any court for receipts and expenditures on her daughter's account, she cannot be allowed eleven years after her ward became of age to prefer a claim for the maintance of her daughter during her minority.— *Pyatt v. Pyatt*, N. J. Perrog. Ct., Sept. 25, 1888; 15 Atl. Rep. 421.

83. HIGHWAYS — Discontinuance — Jurisdiction. —— Under Michigan laws, where it appears that the road is a State road, the board of supervisors have jurisdiction in the matter of its discontinuance, and the insufficiency of the petition affects the validity of the proceedings, so far as the rights of parties are affected by the discontinuance. — *Pearsol v. Board of Supervisors*, S. C. Mich., Oct. 5, 1888; 39 N. W. Rep. 578.

84. HIGHWAY — Obstruction — Nuisance — Municipal Corporation. —— A fence which for seventeen years has encroached upon the highway, a public street, cannot be summarily removed nor abated as a nuisance by the city authorities. — *Pauer v. Albrecht*, S. C. Wis., Oct. 9, 1888; 39 N. W. Rep. 771.

85. HIGHWAYS—Travelers—Defects.——A traveler on a highway is bound to use ordinary care, but, unless he knows of a defect in the traveled road, he has a right to presume that it is reasonably safe. — *Wall v. Town of Highland*, S. C. Wis., Oct. 9, 1888; 39 N. W. Rep. 560.

86. HOMESTEAD—Temporary Removal. ——A widow, living in the second story of a building, removed therefrom, not wishing her children to live over a saloon, but intending to return there when they were married. She rented out the building, and gave an absolute deed of it as security for borrowed money: *Held* that, under Wisconsin law, she did not lose her homestead rights therein.—*McDermott v. Kernan*, S. C. Wis., Oct. 9, 1888; 39 N. W. Rep. 537.

87. HOMICIDE—Murder—First Degree. —— To justify a conviction of murder in the first degree it must be shown that the defendant killed the deceased purposely with premeditation and deliberate malice. — *Beers v. State*, S. C. Neb., Oct. 17, 1888; 39 N. W. Rep. 790.

88. HUSBAND AND WIFE—Conveyance—Consideration. ——Where the money with which property was bought and the title taken in the wife's name was accumulated by taking boarders cheerfully during her husband's absence, the money loaned by her to her husband, afterwards repaid by him and invested in the property in question, the wife's title to it is good.—*Hedge v. Glenny*, S. C. Iowa, Oct., 16, 1888; 39 N. W. Rep. 818.

89. HUSBAND AND WIFE—Sale—Estoppel—Replevin.—Circumstances stated under which it was held in an action of replevin by a wife, that her direction that goods purchased should be charged to her husband, did not authorize the conclusion that she admitted the store and stock of goods to belong to her husband, there having been no estoppel pleaded.—*Bortzenhagen v. Paschen*, S. C. Wis., Oct. 9, 1888; 39 N. W. Rep. 774.

90. INFANCY—Jurisdiction — Process — Service.——A court acquires no jurisdiction, in Iowa, in an action against an infant commenced by alternative service of process, by there being no copy left at the residence of the infant, so far as appears by the return, and this although process was served upon his regular guardian.—*Dohm v. Mann*, S. C. Iowa, Oct. 16, 1888; 39 N. W. Rep. 823.

91. INJUNCTION — Final Decree — Appeal. —— An injunction granted by final decree remains in force after an appeal and *supersedeas* bond, the statute of Iowa on the subject not being applicable to such cases —*Lindsay v. District Court*, S. C. Iowa, Oct. 16, 1888; 39 N. W. Rep. 817.

92. INSANITY—Support—Relatives. —— The brothers and sisters of an insane person are not liable for the expenses incurred in his treatment in the insane hospital during such insanity.—*Richardson Co. v. Frederick*, S. C. Neb., Oct. 10, 1888; 39 N. W. Rep. 621.

93. INSANITY — Support of Insane — Appeal. —— A county is entitled, under Wisconsin laws, to an appeal to the circuit court, which has been refused by the State board of supervision of charitable institutions the correction of an alleged error in its accounts with the State insane asylum, where the petition prays that the board order that certain disbursements, which up to a certain date had been erroneously paid by the county, be thereafter paid by the State.—*State v. State Board of Supervision*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 350.

94. INSOLVENCY—Discharge—Law.——Certain irregularities in proceedings, under the California law, held not to vitiate the proceedings, a discharge being granted.—*Pope v. Kirchner*, S. C. Cal., Sept. 29, 1888; 19 Pac. Rep. 264.

95. INSPECTION—Fish— Judicial Duties. —— The inspector of fish of a city, while acting within his jurisdiction, is not liable for the careless, improper or erroneous performance of his duties, although he knew his unfitness for the position.—*Fath v. Koeppel*, S. C. Wis., Oct. 9, 1888; 39 N. W. Rep. 539.

96. INSURANCE—Action—Venue.——The cause of action on a policy of life insurance arises in the county where the death occurs, under Rev. Stat. Wis. § 2619.—*Brull v. Northwestern, etc. Assn.*, S. C. Wis., Oct. 9, 1888; 39 N. W. Rep. 529.

97. INSURANCE—Conditions—Other Insurance.——An insurance policy conditioned to be void if prior insurance be on the property, is rendered void by a prior policy in the name of only one of the joint owners of the property.—*Honidge v. Dwelling, etc. Co.*, S. C. Iowa, Oct. 6, 1888; 39 N. W. Rep. 648.

98. INSURANCE — Conditions — Waiver. —— Where a policy of insurance provides that additional insurance, procured without the consent of the insurer, should avoid the policy, and that the agent has no authority to modify any of its conditions, the insurer is not estopped to claim such forfeiture for additional insurance, though its agent had told the insured that it would be all right, and though the insured had never seen the policy, and though its agent could in a certain way consent to additional insurance.—*Cleaver v. Traders' I. Co.*, S. C. Mich., Oct. 5, 1888; 39 N. W. Rep. 871.

99. INSURANCE — Insurable Interest — Assignment — Wagering Policy.——Where a policy of insurance on the life of a father is issued to his son, who transfers it to a stranger, the policy is a wagering policy in the hands of the assignee, and the son may recover the amount of it from the assignee.—*Hofman v. Hoke*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 457.

100. INSURANCE—Insurable Interest—Step-son.——A step-son has no insurable interest in his step-father's life, if there are no business obligations between the step-father and the step-son.—*United, etc. Co. v. McDonald*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 439.

101. INSURANCE—Mutual Benefit Societies.——Where a mutual benefit society issues a policy, which is in its terms in conflict with the by-laws of the society, the presumption is that the society has waived its by-laws in favor or the insured.—*Davidson v. Old, etc. Co.*, S. C. Minn., Oct. 16, 1888; 39 N. W. Rep. 803.

102. INSURANCE—Policy—Action—Pleading. ——A petition on a certificate of insurance that the defendant

was the successor of another mutual association which had issued the certificate, and had received all the latter's assets and assumed all its liabilities, sufficiently states the liability of the defendant and the non-existence of the former association.—*Stanley v. Northwestern L. A.*, U. S. C. C. (Ky.), Nov. 25, 1887; 36 Fed. Rep. 75.

103. INSURANCE — Suicide — Insanity.——Where one commits suicide while insane, a policy on his life is rendered void when it provides that it shall become void if he shall commit suicide, felonious or otherwise, sane or insane.—*Scarth v. Security M. L. S.*, S. C. Iowa, Oct. 4, 1888; 39 N. W. Rep. 658.

104. INTERNAL REVENUE—Violation — Forfeiture.—— The act of congress, providing that animals and conveyances used in removing spirituous liquors to evade payment of the tax shall be forfeited, operates on the offending property, irrespective of ownership.—*United States v. Two Mules, etc.*, U. S. D. C. (N. Car.), June Term, 1888; 36 Fed. Rep. 84.

105. INTERVENTION — Fraudulent Conveyance — Lis Pendens—Statute.——Construction of Iowa statutes relative to the intervention of third persons, being claimants in an action by creditors to subject to their demands property alleged to have been fraudulently conveyed; application of the doctrine of *lis pendens* to such cases.—*Des Moines Ins. Co. v. Lent*, S. C. Iowa, Oct. 17, 1888; 39 N. W. Rep. 826.

106. INTOXICATING LIQUORS—Criminal Prosecution — Nuisance—Statute.——Construction of Iowa statutes relative to intoxicating liquors and criminal proceedings for the unlawful sale of such liquors and keeping of them for that purpose. When such sale or keeping for sale may be treated as a nuisance.—*State v. Brown*, S. C. Iowa, Oct. 18, 1888; 39 N. W. Rep. 829.

107. INTOXICATING LIQUORS—Licenses—Remonstrance ——The statute requiring city councils to give notice and hear remonstrances against the issuance of a license to sell intoxicating liquors is mandatory, and a license issued in violation of this statute is void.—*State v. Hanlan*, S. C. Neb., Oct. 17, 1888; 39 N. W. Rep. 780.

108. INTOXICATING LIQUORS—Minors. —— A party is not liable criminally for selling liquors to a minor if he has good reason to believe that the alleged minor is of full age.—*People v. Welch*, S. C. Mich., Oct. 12, 1888; 39 N. W. Rep. 747.

109. INVENTIONS—Construction of Claim—Brewing.—— Letters patent No. 249,332, to T. F. Geis, for grist mixture for brewing purposes, are not infringed by the use of "cerealine" in brewing beer.—*Geis v. Kimber*, U. S. C. C. (Penn.), May 2, 1888; 36 Fed. Rep. 105.

110. INVENTIONS—Distributors of Electricity. —— Patent 351,589, to George Westingbouse, Jr., assignee of Lucien Ganlard and John D. Gibbs, for the distribution and conversion of electric energy, is limited to the series system, and the use of the multiple arc system is not an infringement.—*Westinghouse E. Co. v. Sun E. Co.*, U. S. C. C. (Mass.), Aug. 7, 1888; 35 Fed. Rep. 899.

111. INVENTIONS—Patentability — Principle. —— Letters patent to J. H. Stevens, for improvements in the manufacture of pyroxline are valid, and are not too multifarious in terms.—*Celluloid Mfg. Co. v. Frederick, etc. Co.*, U. S. C. C. (N. J.), June 26, 1888; 36 Fed. Rep. 110.

112. INVENTIONS—Regulating Dynamo Machines.—— Patent 238,315, to Elihu Thomson and Edwin J. Houston, for a regulator for dynamo machines, is not anticipated by patent 223,659, to the same parties.—*Thomson, etc. Co. v. Citizens', etc. Co.*, U. S. C. C. (Mass.), Aug. 14, 1888; 35 Fed. Rep. 904.

113. JUDGMENT — Collateral Attack — Husband and Wife.—— A judgment by default and sale under a mechanic's lien, itself defective and void for the coverture of the defendant and other irregularities, not appearing in the proceedings, cannot be collaterally attacked, as such proceedings are *in rem*, and it is immaterial that the coverture appeared on the deed under which the owner derived title.—*Shryock v. Buckman*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 480.

114. LEGISLATURE—Apportionment of Members.—— Where, in an act apportioning the members of the legislature, a county is omitted, it will retain its representation under the preceding act.—*State v. Van Dwyne*, S. C. Neb., Oct. 3, 1888; 39 N. W. Rep. 612.

115. LICENSE—Theater — Opera. —— An opera is a theatrical exhibition, in Pennsylvania, and a license must be taken out for its performance.—*Bell v. Mahn*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 523.

116. LIMITATIONS—Acknowledgment.—— A reply in an action, denying a counterclaim for goods sold, but admitting the receipt of a large portion of the goods from one of the defendants, is not a sufficient acknowledgment, under Montana law, to take the case out of the statute of limitations, nor does a demurrer to a complaint reciting such reply amount to an acknowledgment.—*Howes v. Lynde*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 249.

117. LIMITATIONS—Adverse Possession — Mortgages.— Possession by the grantee of a mortgagor, who purchased before foreclosure, is not adverse as against the mortgagee, even after foreclosure, when the grantee was not a party to the foreclosure proceedings and has not held the land under a denial of the mortgagee's rights.—*Grether v. Clark*, S. C. Iowa, Oct. 6, 1888; 39 N. W. Rep. 655.

118. LIMITATIONS—Statute—Promise.——A statement made by a debtor to a third person, admitting his indebtedness and promising to pay the debt, is not such a promise as will stop or prevent the running of the statute of limitations.—*Spangler v. Spangler*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 436.

119. LIMITATION OF ACTIONS—Part Payment. ——Circumstances stated under which the operation of the statute of limitations was defeated by the delivery of goods as part payment, the mode in which the accounts between the parties were kept is immaterial. — *Kick's Estate v. Blanchard*, S. C. Vt., Oct. 4, 1888; 15 Atl. Rep. 401.

120. LIMITATION OF ACTION — Promise. —— A debtor who, in a letter to his creditor after alluding to certain old notes, says: "I have no money now, but you shall have every cent that is due on them," does not thereby promise payment in a sense which will take out of the statute of limitations an action brought upon one of those notes. — *Stout v. Marshall*, S. C. Iowa, Oct. 13, 1888; 39 N. W. Rep. 808.

121. LIMITATION OF ACTIONS — Specific Performance— Executory Contract. —— An action to compel specific performance of an executory contract for the sale of land must be brought within six years. — *Lewis v. Prendergast*, S. C. Maine, Oct. 16, 1888; 39 N. W. Rep. 802.

122. LOGS—Driving— Intermixture. —— Rev. St. Wis. § 3337, relating to compensation for driving logs, which are intermixed, belonging to several owners, requires the owner of logs to make provision and furnish labor and materials to drive them to their destination, only after the logs are intermixed, and are floating or being driven with the logs of another. — *Hayward v. Campbell*, S. C. Wis., Oct. 9, 1888; 39 N. W. Rep. 540.

123. MARITIME LIENS—Stevedores— British Vessel.—— The master of a British vessel has authority in the port of New York to employ a stevedore to unload, and the stevedore under the *lex loci* has a lien on the vessel for his services. — *Florez v. The Scotia*, U. S. D. C. (N. Y.), Aug. 8, 1888; 35 Fed Rep. 916.

124. MARITIME LIENS —Supplies — Law of Place. —— The tacit lien for supplies furnished to foreign vessels, if it exists at all, depends wholly on the law of the place, not of the vessel's flag. — *The Scotia*, U. S. D. C. (N. Y.), Aug. 8, 1888; 35 Fed. Rep. 907.

125. MASTER AND SERVANT — Defective Appliances — Fellow-servant. —— A servant was injured by an edger in his master's saw-mill, which by reason of its defects was unnecessarily dangerous: *Held*, that the master was liable, though the feeder of the edger, a co-employee, was guilty of negligence in managing it. — *Sherman v. Menominee R. L. Co.*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 365.

126. MASTER AND SERVANT—Negligence of Servant.—Where three railroads have three crossings very near each other, which they all use in common, and each road pays one of the flagmen necessary, a road is liable for injuries caused by the negligence of the flagman it employed, though he was then flagging the train of another company.— *Buchanan v. Chicago, etc. R. R.*, S. C. Iowa, Oct. 8, 1888; 39 N. W. Rep. 663.

127. MECHANIC'S LIEN—Credit Given. ——A delivered the lumber for a house, and charged it on his books and made out his bills against the contractor. Witnesses testified that the lumber was sold to B, the owner on her credit, and that the business was done in the manner stated at the request of B's agent: *Held*, that A was entitled to a mechanic's lien on the premises. — *Wisconsin P. M. Co. v. Grams*, S. C. Wis., Oct. 9, 1888; 39 N. W. Rep. 531.

128. MECHANIC'S LIENS—Mortgages — Priority.—— A mortgage executed in good faith to secure future advances to be made to pay for labor and materials on a building, which is recorded before the building is begun, is entitled to priority over liens for labor or materials, though the advances were made after the building was begun. — *Wisconsin P, M. Co. v. Schuda*, S. C. Wis., Oct. 9, 1888; 39 N. W. Rep. 558.

129. MECHANIC'S LIEN—Subcontractor—Statute. —— Construction of the mechanic's lien law of Wisconsin-Liability of the owner to subcontractor. When the owner may pay into court the balance due to the principal contractor and be discharged from liability to the subcontractor. — *Wagner v. McMillen*, S. C. Wis., Oct. 9, 1888; 39 N. W. Rep. 777.

130. MINES—Acquisition — Citizenship. —— In establishing title to a mining location the court will require strict proof of citizenship, and where the record of naturalization or papers cannot be produced, the claim proceeding thereon, will not be recognized. — *Wood v. Aspen Mining Co.*, U. S. C. C. (Col.), Aug. 18, 1888; 36 Fed. Rep. 25.

131. MORTGAGE — After Acquired Property. —— A mortgage including such property as may be thereafter acquired to be used in a specified business is valid and good against third persons, and superior to subsequent attachments. — *Eddy v. McCall*, S. C. Mich., Oct. 12, 1888; 39 N. W. Rep. 734.

132. MORTGAGE—Blanks.—— Where a mortgagor executed a mortgage, leaving blanks in the instrument which the notary filled up at the request of the mortgagee without direct authority from the mortgagor to do so, and the evidence was conflicting, the mortgagee testifying and the mortgagor denying that authority was given to the notary to fill up the blanks in the manner in which he did: *Held*, that the mortgage was invalid, the evidence of authority being insufficient. — *Stebbins v. Watson*, S. C. Mich., Oct. 12, 1888; 39 N. W. Rep. 721.

133. MORTGAGE—Foreclosure—Sale—Inadequacy.—— A sale upon foreclosure of a mortgage will not be set aside for inadequacy of price, unless it be shown that a large price could be obtained upon a resale. — *Farmer's Bank v. Quick*, S. C. Mich., Oct. 12, 1888; 39 N. W. Rep. 752.

134. MORTGAGES—Redemption—Equity. ——Where a sale was had under a void foreclosure of a mortgage on real estate, and the mortgagor seeks to cancel the deed as a cloud on his title, he will be required to pay what is equitably due under the decree with interest and taxes. — *Loney v. Courtnay*, S. C. Neb., Oct. 10, 1888; 39 N. W. Rep. 616.

135. MORTGAGE—Redemption— Junior Mortgage.—— A junior mortgagee, after six and before nine months after a sale under a senior mortgage, took an assignment of the certificate of sale, filed with the clerk an affidavit setting out his mortgage lien, and stating that he had redeemed as junior lien holder. He also obtained a deed from the sheriff: *Held*, that the mortgagor or his grantee with knowledge could not redeem without paying both mortgages. — *Lamb v. West*, S. C. Iowa, Oct. 8, 1888; 39 N. W. Rep. 666.

136. MORTGAGE—Rents—Execution. —— A purchaser at a sheriff's sale of mortgaged property, under a lien inferior to the mortgage, is entitled to the rents therefrom, until the purchaser at the foreclosure shall obtain a sheriff's deed, though the mortgagor had assigned all the rent due or to become due to the mortgagee.— *Patton v. Varga*, S. C. Iowa, Oct. 5, 1888; 39 N. W. Rep. 647.

137. MORTGAGE—Sale—Separate Parcels—Release.—— Where a mortgage includes several distinct parcels of land and the mortgagee has released part of it, the land must be sold under foreclosure in separate parcels.— *Keyes v. Sherwood*, S. C. Mich., Oct. 12, 1888; 39 N. W. Rep. 740.

138. MUNICIPAL CORPORATIONS—Bonds—Authority.—— An act authorizing a municipality to issue bonds upon a majority vote of the qualified electors, is abrogated by the new constitution of Tennessee, taking effect before the election is held, and requiring a three-fourth vote to pledge its credit of the municipality.— *Norton v. Taxing District of Brownsville*, U. S. C. C. Tenn., June Term, 1888; 36 Fed. Rep. 99.

139. MUNICIPAL CORPORATION—Bonds— Power — Statute. —— Construction of the statute of Nebraska authorizing a city to issue bonds for water-works in proportion to its taxable property: *Held*, that bonds issued in excess of that proportion are void. — *State v. Babcock*, S. C. Neb., Oct. 17, 1888; 39 N. W. Rep. 783.

140. MUNICIPAL CORPORATIONS—Officers — Salaries.—— A city treasurer cannot, under Iowa law, by contract with the city, alter the compensation fixed by ordinance for the collection and disbursement of city funds. — *Purdy v. City of Independence*, S. C. Iowa, Oct. 5, 1888; 39 N. W. Rep. 641.

141. MUNICIPAL CORPORATIONS—Streets — Lot-owners. —— An owner of a lot on a street has an easement therein to the full width of the street, subject only to the public right to the street. Appropriating a street for an ordinary commercial railroad is not a proper street use.— *Adams v. Chicago, etc. R. R.*, S. C. Minn., Oct. 15, 1888; 39 N. W. Rep. 629.

142. MUNICIPAL CORPORATION — Surface Water — Culverts. —— A city will not be restrained by injunction from building a culvert to facilitate the flow of a natural stream, formed by surface water. — *Goulden v. City of Scranton*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 483.

143. NEGLIGENCE. —— Circumstances stated under which the plaintiff who fell down on an elevator shaft of which he had full knowledge was held to be entitled to no damages, because his own testimony was improbable, unsupported and contradicted by other evidence. — *Huey v. Gahlenbeck*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 520.

144. NUISANCE—Public—Abatement. —— Under Iowa law, a city cannot bring a civil action to abate a nuisance. Its remedy is by ordinance and criminal prosecution.—*City of Otumwa v. Chinn*, S. C. Iowa, Oct. 8, 1888; 39 N. W. Rep. 670.

145. PARTNERSHIP—Contract— Action.—— A contract made by A in behalf of himself and another as his partner cannot be sued on by A alone.—*Dewitt v. Lander*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 349.

146. PARTNERSHIP — Infringement of Patent — Contribution. —— Where plaintiff and defendant were partners and infringed the patent and damages were recovered against them which plaintiff paid: *Held*, that he was entitled after dissolution of the partnership to recover contribution from defendant, his former partner.—*Smith v. Ayrault*, S. C. Mich., Oct. 12, 1888; 39 N. W. Rep. 724.

147. PAYMENT—Voluntary Payment—Attachment.—— Where a defendant in an attachment to relieve his property pays the plaintiff's demand upon a promise that the latter would repay the money if the defdndant could show that he was not liable for it, he is entitled to such repayment upon making proof that he was not so liable. — *Lyman v. Lauderbaugh*, S. C. Iowa, Oct. 12, 1888; 39 N. W. Rep. 812.

148. PAYMENT—What is—Money with Agent. —— Defendant applied to an agent for a loan, the agent received the money from his principal, and embezzled it: *Held*, that the loss must fall on the principal as against the party applying for the loan. — *Boardman v. Blazzard*, U. S. C. C. Iowa, Aug. 30, 1888; 36 Fed. Rep. 26.

149. PLEDGE—Sale — Parol Evidence. —— Parol evidence is admissible to show that goods, sold by a written contract made by a pledgee, were identical with the goods offered for delivery by him.—*Habenicht v. Lissak*, S. C. Cal., Sept. 27, 1888; 19 Pac. Rep. 260.

150. POOR—Support—State Aid.——A county which provides for the maintenance of aged indigent persons is entitled to the *pro rata* appropriation, in California, whether or not there be as many as ten such persons in any one institution in the county.—*Yolo Co. v. Dunn*, S. C. Cal., Sept. 27, 1888; 19 Pac. Rep. 262.

151. POST OFFICE—Larceny from Mails.——A letter is not intended to be conveyed by mail, within the meaning of the statute about secreting letters, when the postal authorities, acting in co-operation with the sender, intend, after the letter is put into the mail, to resume possession of it themselves, or to permit the sender to do so, before it reaches the hands of some postal employee for delivery to the proper person.—*United States v. Matthews*, U. S. C. C. (Md.), Aug. 6, 1888; 35 Fed. Rep. 890.

152. PRACTICE—Default—Setting Aside Judgment.—— Under California law, a default should be vacated where no notice of the overruling of his demurrer has been served on the defendant, although the time given to amend has elapsed since the demurrer was overruled—*Chamberlin v. Del Norte County*, S. C. Cal., Sept. 28, 1888; 19 Pac. Rep. 271.

153. PRACTICE — Reference — Modifying Report. —— Where a court modifies the report of a referee solely as to the conclusions of law, a trial by jury will not be granted at the instance of a party who agreed to the reference and moved for the confirmation of the report.—*In re Hooker's Estate*, S. C. Iowa, Oct. 6, 1888; 39 N. W. Rep. 652.

154. PRACTICE—Reference—Tort.—— Under Wisconsin law, an action for a tort cannot be referred, unless by consent of both parties in writing.—*Stacy v. Milwaukee, etc. Co.*, S. C. Wis., Oct. 9, 1888; 39 N. W. Rep. 532.

155. PRINCIPAL AND SURETY—Creditor — Suing Principal.——The fact that the principal debtor had removed to another State before the surety notified the creditor that the principal was about to become insolvent, did not release the creditor from the obligations of code Iowa, §§ 2108, 2109, about bringing suit.—*Hayward v. Fullerton*, S. C. Iowa, Oct. 5, 1888; 39 N. W. Rep. 651.

156. PROMISSORY NOTE—Indorser—Agreement.——An agreement, made before the signing of a note, that the discounting bank would look only to the indorser for payment, is no defense for the principal on the note, because made prior to the signing, and is in conflict with the note.—*Armstrong v. Scott*, U. S. C. C. (Ohio), Sept. 3, 1888; 36 Fed. Rep. 63.

157. PUBLIC LANDS—Schools—Fences.——The land in Montana, reserved by congress for public schools, is public land, under the act of congress of 1885, forbidding the inclosure of public land.—*United States v. Bisel*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 251.

158. PUBLIC LANDS—Schools—Right of Way.—— The right of way over school lands given to railroads, under congressional act of March 3, 1857, and the territorial act of May 2, 1857, must be used before the lands are sold or disposed of by the State.—*Radke v. Winona, etc. R. Co.*, S. C. Minn., Oct. 9, 1888; 39 N. W. Rep. 624.

159. QUIETING TITLE—Lien — Action. —— Under the statute of Wisconsin, the assignee of a mortgage may maintain an action against a creditor of the the mortgagor's grantor, alleging the conveyance to the mortgagor to have been in fraud of the grantor's creditors. —*Wilson v. Hoover*, S. C. Wis., Oct. 9, 1888; 39 N. W. Rep. 772.

160. RAILROADS—Passenger Station.——A passenger station on a railroad is a stopping place, at which tickets for passage are sold. This is the meaning of the expression when used with reference to ejecting passengers from trains.—*Baldwin v. Grand, etc. Co.*, S. C. N. H., July 19, 1888; 15 Atl. Rep. 411.

161. RAILROADS—Receiver—Insolvency — Certificates. ——The court will not order or permit its railroad receiver to incur unnecessary expenses, even where it appears that such would prove beneficial and consent of some of the creditors is given, where other creditors object, and will not allow such receiver to issue his certificates therefor.—*Incestment Co. v. Phila., etc. R. Co.*, U. S. C. C. (Ohio), Aug. 17, 1888; 36 Fed. Rep. 48.

162. RAPE—Evidence—Complaint.——A complaint of a prosecutrix in a rape case, if made promptly after the fact, is admissible in evidence.—*State v. Reid*, S. C. Minn., Oct. 9, 1888; 39 N. W. Rep. 796.

163. REMOVAL OF CAUSES—Citizenship of Parties.—— In a suit against a corporation and its directors, the directors are not merely nominal parties, and where it appears that one of the defendants is a resident of the District of Columbia, or of the same State as the plaintiff, the same is not removable, under the act of 1887.—*Seddon v. Virginia, etc. Co.*, U. S. C. C. (W. Va.), Aug. 7, 1888; 36 Fed. Rep. 6.

164. REMOVAL OF CAUSES—Local Prejudice—Proof.—— Under the act of March, 1887, a cause may be removed by a defendant, a non-resident, for local prejudice, and it is not necessary that all the parties on one side be citizens of different States from all the parties on the other side, and the removal is not confined to cases where there is a separate controversy between the plaintiff and the defendant seeking the removal, and the local prejudice may be shown by *ex parte* affidavits.—*Whelan v. New York, etc. R. Co.*, U. S. C. C. (Ohio), July 24, 1888; 35 Fed. Rep. 849.

165. REMOVAL OF CAUSES — Motion — Time. —— The United States circuit court has no power to remand a removed cause prior to the return day, that being the next regular term after the removal.—*Kansas City T. R. Co. v. Interstate L. Co.*, U. S. C. C. (Mo.), Aug. 27, 1888; 36 Fed. Rep. 9.

166. REPLEVIN—Election — Damages. —— Where, in replevin, plaintiff elects to take a money judgment, he is entitled to recover the value of the property and damages for its detention.—*Hasted v. Dodge*, S. C. Iowa, Oct. 8, 1888; 39 N. W. Rep. 668.

167. RES ADJUDICATA — Judgment. —— The judicial determination of a point in question binds the parties and privies in any subsequent litigation, though the two proceedings are not otherwise identical.—*Neal v. Foster*, U. S. C. C. (Oreg.), Aug. 20, 1888; 36 Fed. Rep. 29.

168. SALE—Action—Evidence.——Where, after a sale of goods, the vendor returns the notes taken because they are not satisfactory, and the vendee fails to return the goods, he is liable for the price, because by his failure to so return them, the sale becomes absolute.—*George v. Swafford*, S. C. Iowa, Oct. 13, 1888; 39 N. W. Rep. 804.

169. SALE—Contract—Rescission—Jury. —— Where a sale of a horse has been made and a breach of the contract charged, it is a question for the jury whether an offer to rescind and restore the horse was made within a reasonable time.—*Gridley v. Globe, etc. Co.*, S. C. Mich., Oct. 12, 1888; 39 N. W. Rep. 754.

170. SALE — False Representations — Replevin — Evidence.——In an action of replevin for goods sold upon false representations, the vendor may explain in his evidence how and why he was with the defendant when the false representations were made.—*Arnstine v. Treat*, S. C. Mich., Oct. 12, 1888; 39 N. W. Rep. 749.

171. SALE—Warranty— Contract — Rescission — Damages.——Where, in a contract of sale, the vendor is bound by a warranty of quality, but it is agreed between the parties that if the vendee is dissatisfied he may rescind the contract and return the goods: *Held*, that this privilege does not preclude him from retaining the goods and bringing an action for damages for

breach of the contract.—*Shupe v. Collender*, S. C. Err. Conn., March Term, 1888; 15 Atl. Rep. 405.

172. SCHOOL—School District—Fraud—Pleading.——A bill which charges that certain school directors are combining to illegally levy a school tax for the purpose of purchasing a school building, sufficiently alleges that those directors are interested in the building, and are unlawfully endeavoring to sell it to the school district.—*Appeal of Witmer*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 428.

173. SCHOOL DISTRICT—School Fund—Action—Bond.—Where, under the statute of Iowa, the treasurer has credited himself on his books with money paid to a particular school district, he is liable for it on his bond, as the credit on his books furnishes *prima facie* evidence of the fact, and the law does not require the production of the warrant duly countersigned.—*District, etc. Co. v. Esperet*, S. C. Iowa, Oct. 13, 1888; 39 N. W. Rep. 809.

174. SEAMEN—Shipment—Fees of Commissioners.——Vessels engaged in the inland river trade of the State of Alabama, though carrying merchandise between the several States, are not engaged in coastwise trade, within the meaning of the act of congress, so as to entitle a shipping commissioner to the fees therein provided for shipping crews for such vessels.—*Racesies v. United States*, U. S. D. C. (Ala.), July 24, 1888; 35 Fed. Rep. 917.

175. SHIPPING—Delivery—Measure of Damages.——The measure of damages for the non-delivery of goods is their value at the port of destination, with interest on that amount from the time that delivery ought to have been made.—*Thompson v. The Nith*, U. S. D. C. (Oreg.), Aug. 30, 1886; 36 Fed. Rep. 86.

176. SHIPPING—Inspection—State Vessels.——The steam vessels belonging to the State of Maryland, used in enforcing the State fishery laws, are liable to the penalties of § 4499 for non-compliance with the provisions of the United States law regulating steam vessels.—*The Governor R. McLane v. United States*, U. S. C. C. (Md.), March 27, 1888; 35 Fed. Rep. 926.

177. SHIPPING—Limiting Liability.——In December, 1885, a lighter, worth $300, being on fire, drifted from her moorings and burned B's schooner, valued at $1,500. In the State court B got judgment against the owner for $1,500. The owner then filed a libel in the federal court to restrain B from enforcing his judgment beyond the value of the lighter: *Held*, that the libel should be dismissed, since the act of congress of 1886 is not retroactive.—*Chappell v. Bradshaw*, U. S. C. C. (Md.), May 16, 1888; 35 Fed. Rep. 923.

178. SHIPPING—Negligent Stowage.——It is negligence in a vessel to stow bags of rape-seed over chalk in the hold of a vessel, in view of certainty of damage to the chalk in case the bags of seed should be broken.—*The Bitterne*, U. S. D. C. (N. Y.), July 27, 1888; 35 Fed. Rep. 927.

179. SPECIFIC PERFORMANCE—Rent—Accounting.——After A has sold realty to B and put him in possession, A cannot, while that contract is existing, rent the premises to another, without accounting for the rent.—*Kinkaid v. Hiatt*, S. C. Neb., Oct. 3, 1888; 39 N. W. Rep. 600.

180. STATUTE—Construction.——Words in a statute, to which no effect can be given, should be rejected as without meaning.—*Leavitt v. Lovering*, S. C. N. H., July 19, 1888; 15 Atl. Rep. 414.

181. STOCKHOLDERS—Liability—Fraud.——A railroad corporation, being organized, bought a road at about fifteen times its value, and issued stock and bonds therefor. A stockholder, to pay a debt, gave the stock and bonds of the road in amount of three times the road's value; on these bonds a judgment was rendered against the company, and the stockholders held liable for the amount of their unpaid stock to satisfy said judgment.—*Preston v. Cincinnati, etc. R. Co.*, U. S. C. C. (Ohio), Aug. 28, 1888; 36 Fed. Rep. 54.

182. TAXATION—Erroneous—Repayment.——A claim for taxes paid on land not subject to assessment, must, under Nebraska law, be presented to the county board for audit and allowance, and their action thereon is a final adjudication, unless appealed from.—*Richardson County v. Hull*, S. C. Neb., Oct. 4, 1888; 39 N. W. Rep. 608.

183. TAXATION—Mortgage to State.——The owner of land, on which there is a mortgage to the regents of the university, is entitled to have the amount of the mortgage deducted from the value of the property for the purposes of taxation, under California law.—*People v. Board of Supervisors*, S. C. Cal., Sept. 27, 1888; 19 Pac. Rep. 257.

184. TAXATION—Tax-deeds—Statute.——Construing the law of Wisconsin relative to tax-deeds.—*Whittlesey v. Hoppenyan*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 355.

185. TAX-TITLE—Quitclaim.——Circumstances stated under which it was held that a tax-title, supplemented by a quitclaim deed from the original owner, was superior to a subsequent deed made by the owner to the defendant.—*Knight v. Campbell*, S. C. Iowa, Oct. 17, 1888; 39 N. W. Rep. 829.

186. TENANCY IN COMMON—Rights—Accounting.——The cotenancy of a purchaser of the interest of a tenant in common in real estate commences at the time of making the deed, and not prior thereto.—*Davis v. Chapman*, U. S. C. C. (Ind.), Aug. 18, 1888; 35 Fed. Rep. 42.

187. TRADE-MARK—Geographical Term—Injunction.—The manufacturer of good, who has for many years used as a trade-mark the geographical terms "Lamoille" and "Willoughby Lake," will be protected in their use as against one who does not carry on business in the districts so designated.—*Pike M. Co. v. Cleveland S. Co.*, U. S. C. C. (Mass. and N. H.), July 26, 1888; 35 Fed. Rep. 896.

188. TRIAL—Evidence—Objection.——Where evidence offered by defendants is admitted without objection from plaintiff, it cannot afterwards be stricken out by the court on its own motion over plaintiff's objection.—*Lewars v. Weaver*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 514.

189. TRUSTS—Agency.——An agent cannot acquire his principal's property by using his own funds to make what is in effect a redemption of the subject-matter of his agency.—*Mallagh v. Mallagh*, S. C. Cal., Sept. 26, 1888; 19 Pac. Rep. 256.

190. UNITED STATES COMMISSIONER—Examination—Waiver.——Rev. Stat. U. S. § 1014, requires that commissioner's examinations shall be held "agreeably to the usual mode of process against offenders in the State:" *Held*, under this, that in Indiana, a commissioner is not bound to accept a waiver of examination, but may proceed to hearing.—*Van Buren v. United States*, U. S. D. C. (Ind.), Aug. 15, 1888; 35 Fed. Rep. 77.

191. USURY—Bona Fide Holder—Notice.——Where a transaction is usurious the holder of the note is affected by it, unless he can show that he received the note in due course of trade before maturity and without notice of the usury, or that he had obtained it from one who had so received it.—*Knox v. Williams*, S. C. Neb., Oct. 17, 1888; 39 N. W. Rep. 786.

192. VENDOR AND VENDEE—Scire Facias—Easement.——In a *scire facias* on a mortgage debt for purchase money defendant may set up as a defense the existence of an easement on the land, although he has availed himself of the same offense in a former action on the same debt.—*Eby v. Elder*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 423.

193. WILL—Construction—Executors.——Construction of a will and statement of the terms upon which testator's son should replace an executor named or a deceased executor: *Held*, that under these terms the testator's son should not succeed to the executorship unless he was twenty-one years of age at the death of the testator.—*Knox v. Newman*, N. J. Ct. Chan., Oct. 2, 1888; 15 Atl. Rep. 415.

194. WILL—Construction—Mortgage—Execution.——Where a testator is bound, secondarily by certain debts which are secured by mortgage on the lands of the principal debtor, and provides that his share of the estate shall not be paid to him until the mortgages are

paid, the executors cannot be allowed credit for the mortgages if they pay them until they have secured assignments thereof and are in position to distribute the the estate. — *Hurlbut v. Hutton*, N. J. Ct. Chan., Oct. 2, 1888; 15 Atl. Rep. 417.

195. WILLS—Devisees—Widow—Estoppel.—— A took a legacy bequeathed to her in B's will: *Held*, that A was not estopped from taking under the will of B's widow property which she received by renouncing her claim under B's will and taking under the provisions of law. —*Beem v. Kimberly*, S. C. Wis., Oct. 9, 1888; 39 N. W. Rep. 542.

196. WILLS—Estate Granted — Restraints. —— A devise of land to A to occupy and enjoy it during his natural life gives a life estate, and a further provision, that he shall not alienc or incumber it and that it shall not be subject to attachment or levy, is void. — *McCormick H. M. Co., v. Gates*, S. C. Iowa, Oct. 4, 1888; 39 N. W. Rep. 657.

197. WILL—Legacy—Interest.—— Where a part of an estate is bequeathed to a legatee and some time elapses after the death of the testator before the legacy is paid, the legatee is entitled to interest on the legacy from the death of the testator.— *Lawrence v. Security Co.*, S. C. Err. Conn., March Term, 1888; 15 Atl. Rep. 406.

198. WITNESS—Impeaching— Parties. —— When defendant calls the plaintiff as a witness he cannot impeach the reputation of the latter for the truth and veracity, but may show by another witness a different state of facts.—*Gardner v. Connelly*, S. C. Iowa, Sept. 8, 1888; 39 N. W. Rep. 650.

199. WRITS — Service of Summons — Harmless Error. —— Where the service of a summons and complaint, signed by a non-resident attorney not authorized to practice in the State, is set aside, but the plaintiff is allowed to substitute the names of resident attorneys and to serve the papers on defendant's attorney, the defendant is not harmed thereby until it is attempted to bring him into court thereby. — *Prentice v. Stefam*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 364.

200. WRITS—Suits in Rem — Service. —— A bill which prays (1) for an account, (2) for damages, and (3) for a receiver, is not a suit in contemplation of the act, which authorizes service on non-resident defendants wherever found, in suits "to enforce any legal or equitable lien upon, or claim to, or to remove any incumberance or lien, or cloud upon the title to real or personal property within the district where such suit is brought." Supp. Rev. St. U. S. 176. — *Ellis v. Reynolds*, U. S. C. C. (Pa.), June 1, 1888; 35 Fed. Rep. 394.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERY No. 12.

Will you please inform me whether the statutes of Missouri fix the amount of damages recoverable by the representatives of a person killed by the negligence of a railroad company? Does the common law measure of damages prevail, or have you a limiting statute? J. W. H.

RECENT PUBLICATIONS.

THE COMPLETE DIGEST.—A Digest of all the Reported American Cases and Selected English Cases, with Synopses of Statutes of General Interest, Reference to Articles and Essays in Current Law Periodicals, and to Text-books and other Matters of Value to the Profession, Contained in the Various Law Publications, from January to July, 1887. Editors: E. A. Jacob, J. A. Mallory, F. B. Walrath. Associate Editors: W. G. Challis, G. L. Lincoln, W. Hall, M. Cooper, D. Walrath. 1887. Part I. New York: Digest Pub. Co., Publishers. 1888.

The notable increase of case law, and the multiplication of reports and reporters have rendered necessary a corresponding increase and improvement in the means of reference to adjudge cases and to other legal literature. In other words, the digest and other like works should have kept pace with the growth of the legal publications to which they refer, and in point of fact they have done so of which the volume before us is sufficient evidence. The examination which we have been able to give this work has satisfied us of its very great value to the profession as, in addition to the abstract of adjudged cases which usually appear in digest, the learned and diligent editors have included also abstracts of recent and current English decisions deemed of value to American readers, and also references to other matters of great interest and usefulness to the profession which do not usually appear in similar publications. It will be found that the editors have included within the scope of their labors references to, and abstracts of, recent and important statutes and recent treatises on various subjects of the law and matters of interest which appear editorially or otherwise, in the legal journals published within the period treated by the volume. These new features are worthy of the highest commendation, and will no doubt address themselves to the favorable consideration of the profession. The volume is very large (3,251 pages), is well printed and bound, and in every respect a first-class law book.

JETSAM AND FLOTSAM.

WHEN a lawyer asks the witness if he is sure he is telling the truth, he expects the reply: "No sir; I am committing perjury." Otherwise he would not ask such a silly question.

LAWYER CURRAN had a friend who was very precise in his use of language. One day they heard a man say "curosity" instead of curiosity. The friend remarked: "Just listen how that man does murder the language." "Not so bad as that," rejoined Curran, "he only knocked an eye out."

A STORY is told of an Irishman who was indicted for murder in England. In due time he was arraigned before the Queen's bench, and when the Court put the usual question as to his guilt or innocence the prisoner said: "Your Honor, I should like to hear the evidence before I plead quilty or not guilty."

SAID a gentleman to an Irish soldier, "Did you come through the whole war without a scratch Pat?"

"Not I, yer honor! Once a bullet went right through here," and he pointed to his left breast.

"Surely not! It must have hit your heart, if it went through there."

"Och, yer honor, not at all, at all! Why, me heart was in me mouth all the toime!"